

U.S. Department of Labor

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Issue Date: 07 November 2005

**Case Nos.: 2004-LHC-2070
2004-LHC-2071**

**OWCP Nos.: 07-156955
07-156142**

IN THE MATTER OF

TAMMY B. LEWIS,
Claimant

vs.

**NORTHROP GRUMMAN SHIP SYSTEMS, INC./
AVONDALE INDUSTRIES, INC.,**
Employer

APPEARANCES:

ERIC HALVERSON, JR., ESQ.,
On Behalf of the Claimant

RICHARD S. VALE, ESQ.,
On Behalf of the Employer

BEFORE: PATRICK M. ROSENOW
Administrative Law Judge

DECISION AND ORDER

PROCEDURAL STATUS

This case consolidates two claims for benefits under the Longshore and Harbor Workers Compensation Act (the Act), 33 U.S.C. § 901 *et seq.*, brought by Tammy B. Lewis (Claimant) against Northrop Grumman Ship Systems, Inc./Avondale Industries, Inc. (Employer).

The matter was referred to the Office of Administrative Law Judges for a formal hearing. Both parties were represented by counsel. On 22 Mar 05, a hearing was held at which the parties were afforded a full opportunity call witnesses and cross examine witnesses, offer exhibits, make arguments and submit post-hearing briefs.

My decision is based upon the entire record, which consists of the following:¹

Witness Testimony of

Claimant
Al Kitzman
Glen Weber
Robert Lambert
Kristen Barney
Dot Moffett-Douglas

Exhibits

Claimant's Exhibits (CX) 1-21²
Employer Exhibits (EX) 1-31³

My findings and conclusions are based upon the stipulations of Counsel, the evidence introduced, my observations of the demeanor of the witnesses, and the arguments presented.

STIPULATIONS⁴

The parties stipulate and I find as fact:

1. That if there were injuries as alleged,
 - a. They occurred while there was an employer/employee relationship.
 - b. They were within the scope and course of employment.
 - c. They would be within the coverage and jurisdiction of the Act.
2. The dates of injury were 30 Mar 00 and 13 Jun 00.
3. The Average Weekly Wage (AWW) is \$386.40.

¹ I have reviewed and considered all testimony and exhibits admitted into the record. Reviewing authorities should not infer from my specific citations to some portions of witness testimony and items of evidence that I did not consider those things not specifically mentioned or cited.

² CX-5 is the memorandum of the informal conference. Although in his brief Claimant's counsel refers to the recommendation that was made, this is a de novo hearing and the recommendation is not relevant for any substantive purpose at this point. CX-16 was admitted for its tendency to show what the various witnesses said, rather than for its findings or conclusions.

³ The admission of EX-24 was limited to its tendency to directly rebut evidence of Claimant's physical disability rather than its tendency to establish Claimant made false statements and thereby impeach her testimony.

⁴ Tr. 35, 78.

FACTUAL BACKGROUND

Claimant was a painter who suffered back injuries on 30 Mar 00 and 13 Jun 00. She was unable to continue working as a painter and for several months was restricted from working at all. Employer provided medical treatment and disability compensation. Claimant returned to work for Employer in a sedentary job, which paid more than her original job. Claimant was prescribed a special type of chair for use at work. Eventually, Claimant was accused of stealing soda from a broken vending machine and her employment was terminated.

POSITIONS OF THE PARTIES

Claimant argues that since she was never able to return to her painter job, the burden is on Employer to establish suitable alternative employment (SAE). She maintains that the desk job was sheltered employment. Claimant further contends that even if the desk job was not sheltered employment, Employer failed to provide adequate orthopedic support in the form of a proper chair. Consequently, she suffered such pain that the position did not qualify as SAE. In addition, Claimant maintains she did not steal any sodas and Employer was simply using the alleged theft as a pretext for terminating her and the real reason for her discharge was her disability. Claimant also suggests that since none of the positions Employer's vocational expert submitted included the provision of an adequate orthopedic support chair, those jobs do not qualify as possible SAE. Consequently, Claimant argues that she was injured and unable to return to her original job. She further contends that since Employer has not established any SAE, she is entitled to total disability. Finally, Claimant seeks authorization for surgery on her back and reimbursement for emergency room visits and pain management.

Employer responds that it has provided and will continue to provide all reasonable and necessary medical treatment. However, Employer contends Claimant's subjective pain complaints are inconsistent with her physical condition and neither surgery nor pain management treatments are reasonable or necessary. It further argues that the desk job it provided Claimant was not sheltered employment, but a meaningful position. Employer also submits it provided an adequate chair and the reason Claimant was terminated was Employer's belief that she did in fact steal sodas. Employer maintains it is not obliged to provide Claimant with any disability benefits because it provided Claimant with SAE that paid more than her AWW and she was subsequently terminated solely due to her misconduct.

LAW

Disability Compensation

In the absence of any substantial evidence to the contrary, the Act presumes that a claim comes within its provisions.⁵ The presumption takes effect once the claimant establishes a *prima facie* case by proving that she suffered some harm or pain and that a work related condition or accident occurred which could have caused the harm.⁶

Once the presumption applies, the burden is on the employer to go forward with substantial countervailing evidence to rebut the presumption that the injury was caused by the claimant's employment.⁷ Once an employer offers sufficient evidence to rebut the presumption, it is overcome and it no longer controls the result.⁸ If the presumption of compensability is successfully rebutted, the presumption no longer affects the outcome of the case. The fact-finder must then weigh all the evidence in the record and resolve the fact at issue based on the evidence.⁹

However, the presumption does not apply to the issue of whether a physical harm or injury occurred¹⁰ and does not aid the claimant in establishing the nature and extent of disability.¹¹

To establish a *prima facie* case of total disability, the employee need only show she cannot return to her regular or usual employment due to her work-related injury.¹² If the claimant makes this *prima facie* showing, the burden shifts to employer to show suitable alternative employment.¹³ The presumption of disability ends on the earliest date that the employer establishes suitable alternate employment.¹⁴

⁵ 33 U.S.C. § 920(a)(2001).

⁶ Gooden v. Director, OWCP, 135 F.3d 1066 (5th Cir. 1998).

⁷ Swinton v. J. Frank Kelly, Inc., 554 F.2d 1075, 1082 (D.C. Cir. 1976), cert. denied, 429 U.S. 820 (1976).

⁸ Noble Drilling Co. v. Drake, 795 F.2d 478 (5th Cir. 1986).

⁹ *Id.*

¹⁰ Devine v. Atlantic Container Lines, G.I.E., 25 BRBS 15 (1990).

¹¹ Holton v. Independent Stevedoring Co., 14 BRBS 441 (1981); Duncan v. Bethlehem Steel Corp., 12 BRBS 112 (1979).

¹² Elliot v. C & P Tel. Co., 16 BRBS 89 (1984).

¹³ Clophus v. Amoco Prod. Co., 21 BRBS 261 (1988); Nguyen v. Ebttide Fabricators, 19 BRBS 142 (1986)

¹⁴ Palombo v. Director, OWCP, 937 F.2d 70, 25 (2nd Cir. 1991)

An employer can show suitable alternative employment by offering the claimant a job in its facility.¹⁵ However, such a job must be a “substantial” one, not designed for the primary benefit of the employee. The job cannot be “sheltered employment.” An employer-provided job or “sheltered employment” will not establish suitable alternative employment if it is a job for which the employee is paid even if she cannot do the work or the job is unnecessary to the employer’s operations and was created merely to place claimant on the payroll.¹⁶

To qualify as suitable alternative employment, the employer-offered job may be different than the original one and may involve light duties to accommodate the employee’s injury.¹⁷ The job may even be specifically tailored for the employee.¹⁸ However, an offered job that is too physically demanding for the claimant to perform is not suitable alternate employment.¹⁹ To qualify as suitable alternative employment, the job must accommodate all working conditions required by all physicians of record.²⁰

Even if the claimant accepts the job, it does not qualify as SAE if it requires the claimant to expend extraordinary effort or endure excruciating pain or diminished strength.²¹ This exception is narrowly applied.²²

Where claimant's pain and limitations do not rise to the level of working only with extraordinary effort and in spite of excruciating pain, such factors nonetheless are relevant in determining a claimant's post-injury wage-earning capacity. These factors may support an award of permanent partial disability benefits under Section 8(c)(21) based on a reduced earning capacity, despite the fact that a claimant's actual earnings may have increased.²³

¹⁵ Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685 (5th Cir. 1996); Darden v. Newport News Shipbuilding, 18 BRBS 224 (1986)

¹⁶ Harrod v. Newport News Shipbuilding & Dry Dock Co., 12 BRBS 10 (1980)

¹⁷ Walker v. Sun Shipbuilding, 19 BRBS 171 (1986)

¹⁸ Darden, 18 BRBS at 224

¹⁹ Mason v. Bender Welding & Mach. Co., 16 BRBS 307 (1984)

²⁰ Crum v. General Adjustment Bureau, 738 F.2d 474 (D.C. Cir. 1984) rev'g in pertinent part 16 BRBS 101 (1983). See also Poole v. National Steel & Shipbuilding Co., 11 BRBS 390 (1979) (job meeting only one restriction is not suitable alternate employment); Jameson v. Marine Terminals, 10 BRBS 194 (1979) (offering to try employee in job not meeting medical restrictions is not suitable alternate employment)

²¹ Haughton Elevator Co. v. Lewis, 572 F.2d 447 (4th Cir. 1978) (Exception applied where claimant managed to get through workday, despite pain, swelling, and excruciating pain; once at home went directly to bed to lie flat on his back; and only over weekends experienced a measure of relief.).

²² Jordan v. Bethlehem Steel Corp., 19 BRBS 82 (1986).

²³ Metropolitan Stevedore Co. v. Rambo, 521 U.S.121 (1997).

An employer may also meet its burden by showing the existence of realistically available job opportunities within the geographical area where the employee resides which he is capable of performing, considering his age, education, work experience, and physical restrictions, and which he could secure if he diligently tried.²⁴ Employer may meet its burden by first introducing evidence of suitable alternate employment at the hearing,²⁵ even though such evidence may be suspect and found to be not creditable.²⁶

The employer is not required to act as an employment agency for the claimant. However, it must prove the availability of actual, not theoretical, employment opportunities by identifying specific jobs available to the employee within the local community.²⁷ The employer must present evidence that there is a range of jobs that are reasonably available, which the disabled claimant would realistically be able to secure and perform.²⁸

After the employer establishes suitable alternative employment, the Claimant has the burden of establishing reasonable diligence in seeking out and accepting suitable alternate employment and must demonstrate a willingness to work.²⁹

Once the employer has made an offer of re-employment, and the claimant is later fired for reasons unrelated to the work-related disability, the employer no longer has a duty to show other suitable alternative employment.³⁰ If the employer-provided position is not “sheltered employment,” the employer has satisfied the requirement to show suitable alternative employment. Accordingly, total disability would not apply. In such cases, the Act is designed to compensate for “incapacity because of injury to earn the wages which the employee was receiving at the time of injury.”³¹ Incapacity is the difference between the average weekly wage (AWW) and the post injury wage-earning capacity.³²

²⁴ Diamond M. Drilling Co. v. Marshall, 577 F.2d 1003, (5th Cir. 1978), affg Kilsby v. Diamond M. Drilling Co., 6 BRBS 114 (1977)

²⁵ Turney v. Bethlehem Steel Corp., 17 BRBS 232, 236-37 n.7 (1985)

²⁶ Diamond M Drilling Co., 577 F.2d at 1007 n.5

²⁷ New Orleans (Gulfwide) Stevedores v. Turner, 661 F.2d 1031, 1042-43 (5th Cir. 1981)

²⁸ P & M Crane Co. v Hayes, 930 F.2d 424 (5th Cir. 1991)

²⁹ New Orleans (Gulfwide) Stevedores, 661 F.2d at 1031

³⁰ Darby v. Ingalls Shipbuilding, Inc., 99 F. 3d 685 (5th Cir. 1996).

³¹ 33 USC § 902(10) (2001).

³² 33 USC § 908 (2001)

The Act states that:

[T]he wage-earning capacity of an injured employee ... shall be determined by his actual earnings if such actual earnings fairly and reasonably represent his wage-earning capacity: Provided, however, that if the employee has no actual earnings or his actual earnings do not fairly and reasonably represent his wage-earning capacity, the deputy commissioner may, in the interest of justice, fix such wage-earning capacity as shall be reasonable, having due regard to the nature of his injury, the degree of physical impairment, his usual employment, and any other factors or circumstances in the case which may affect his capacity to earn wages in his disabled condition, including the effect of disability as it may naturally extend into the future.³³

If a party contends that the actual earnings do not fairly represent the wage-earning capacity, it bears the burden of persuasion on that issue.³⁴

Medical Care and Benefits

Section 7(a) of the Act provides that:

The employer shall furnish such medical, surgical, and other attendance or treatment, nurse and hospital service, medicine, crutches, and apparatus, for such period as the nature of the injury or the process of recovery may require.³⁵

The employer is liable for all medical expenses which are the natural and unavoidable result of the work injury. For medical expenses to be assessed against the employer, the expense must be both reasonable and necessary.³⁶ Medical care must also be appropriate for the injury.³⁷

A claimant has established a **prima facie** case for compensable medical treatment where a qualified physician indicates treatment was necessary for a work-related condition.³⁸

³³ 33 USC §908(h)(2001)

³⁴ Burch v. Superior Oil, 15 BRBS 423 (1983); Gage v. J.M. Martinac Shipbuilding, 21 BRBS 66 (1988)

³⁵ 33 U.S.C. § 907(a).

³⁶ Pernell v. Capitol Hill Masonry, 11 BRBS 532, 539 (1979).

³⁷ 20 C.F.R. § 702.402.

³⁸ Turner v. Chesapeake & Potomac Tel. Co., 16 BRBS 255, 257-258 (1984).

Section 7 does not require that an injury be economically disabling for claimant to be entitled to medical benefits, but only that the injury be work-related and the medical treatment be appropriate for the injury.³⁹ Entitlement to medical benefits is never time-barred where a disability is related to a compensable injury.⁴⁰

An employer is not liable for past medical expenses unless the claimant first requested authorization prior to obtaining medical treatment, except in the cases of emergency, neglect or refusal.⁴¹ Once an employer has refused treatment or neglected to act on claimant's request for a physician, the claimant is no longer obligated to seek authorization from employer and need only establish that the treatment subsequently procured on her own initiative was necessary for treatment of the injury.⁴²

The employer's refusal need not be unreasonable for the employee to be released from the obligation of seeking her employer's authorization of medical treatment.⁴³ Refusal to authorize treatment or neglecting to provide treatment can only take place after there is an opportunity to provide care, such as after the claimant requests such care.⁴⁴ Furthermore, the mere knowledge of a claimant's injury does not establish neglect or refusal if the claimant never requested care.⁴⁵

EVIDENCE AND ANALYSIS

Evidence

Claimant testified at trial⁴⁶ that:

She is 38 years old and a high school graduate. After high school she worked as a veterinarian tech assistant, worked for a candy company, and did some cashier work. She also took a course in hairdressing, but was not able to finish the licensing test. She started working for Employer in October of 1998 as a "brush painter helper." She cleaned-up and wiped down bulkheads, decks, and overheads.

³⁹ Ballesteros v. Willamette Western Corp., 20 BRBS 184, 187.

⁴⁰ Weber v. Seattle Crescent Container Corp., 19 BRBS 146 (1980); Wendler v. American National Red Cross, 23 BRBS 408, 414 (1990).

⁴¹ Schoen v. U.S. Chamber of Commerce, 30 BRBS 103 (1997); Maryland Shipbuilding & Drydock Co. v. Jenkins, 594 F.2d 404, 10 BRBS 1 (4th Cir. 1979), rev'g 6 BRBS 550 (1977).

⁴² Pirozzi v. Todd Shipyards Corp., 21 BRBS 294 (1988); Rieche v. Tracor Marine, 16 BRBS 272, 275 (1984).

⁴³ See generally 33 U.S.C. § 907 (d)(1)(A).

⁴⁴ Mattox v. Sun Shipbuilding & Dry Dock Co., 15 BRBS 162 (1982).

⁴⁵ Id.

⁴⁶ Tr. 49-126

On 9 Jul 99, Claimant was working on top of ventilation ducts and confined to that space for three days. When she got down, she could not stand up. She was taken to First Aid, where she was given a pain injection and sent home for two weeks. She was paid benefits for this injury.

Claimant suffered another injury in March of 2000 while pulling out wooden pallets, ventilation ducts, airlines, watersuck lines, electrical cables, and pieces of steel from underneath the ship. By the time she got to the aft end of it, she was on her hands and knees. She went to First Aid, where she got a pain injection and was sent home. She lost time from work due to that injury and was again paid compensation benefits. At some point after the second accident, she had a rheumatoid arthritis test done, which was negative.

In June of 2000, she was working in ventilation ducts about 9 to 15 inches in diameter. Although her back hurt, she continued to work for three more days. On the last day, she could not walk. At that time, Claimant reported the incident to Employer, who did not offer her treatment. She then saw the company Doctor, Dr. Mabey. He told her the shipyard was no place for her. She joked in response about retiring and he sent her home.

Claimant eventually saw her doctor of choice, Dr. Parnell, who treated her for a few months. He put her on medication and told her not to work. She was out of work for four months. During the first 17 weeks, Employer did not pay her benefits. Claimant eventually retained counsel and Employer finally paid her benefits. Dr. Parnell referred her to Dr. Crapanzano. Dr. Crapanzano gave her epidural steroid injections. She was treated by Dr. Crapanzano for more than a year, without relief.

She was assigned light duty, but Employer had her working beyond her restrictions. Dr. Crapanzano restricted Claimant to no sweeping, bending, stooping, or lifting. However, her bosses made her sweep the deck and pick up trash. Claimant would leave work in tears everyday because of her pain, but did not want to lose her job. Eventually Claimant was given a job in the paint warehouse making paint swabs. Then Employer provided a job for her as a dispatcher, which required calling in broken equipment, ordering materials, and ordering backing trucks. This job required that Claimant answer phones, allowing her to sit down all day. She told her boss she could not sit for that period of time without getting up because of pain.

At that point, Dr. Crapanzano requested an orthopedic chair with lumbar support. Employer provided a task chair. It had a little round seat and sat on a pipe with things that have coaster wheels. It had a little mobile part in the back with a bar that attaches the top part to the bottom. The task chair had no support for her lower back and provided no help. She complained to Employer.

Since the epidural injections weren't working, Dr. Crapanzano sent her to Dr. Ortenberg. Claimant treated with Dr. Ortenberg for about two to two and a half years. Dr. Ortenberg gave her trigger point injections and offered physical and occupational therapy. Claimant received no relief from Dr. Ortenberg's treatment. Dr. Ortenberg repeatedly asked Employer to provide Claimant with an orthopedic support chair and headset.⁴⁷ Employer never provided Claimant with either an orthopedic support chair or headset.

Claimant applied for a position as a material project administrator, but was told she could not jump two grade levels. Instead, she was offered a position as a senior material analyst. To qualify for the position, she attended evening computer school at Employer's facility.

In April 2003, Claimant became a senior material analyst for Employer. As an analyst she tracked material, went to meetings, billed package reports, followed-up on material, and entered information into the computer system. She called companies to make sure they had the right material, took orders for material, and occasionally visited the trades to make sure the ordered material was received. Her last supervisor was Al Kitzman. She also worked with Glenn Weber, Steve Boudreaux, Bob Lewis, Johnny Franklin, Richard Brumfield, and another, whose name she cannot remember.

Claimant worked in an office and had a desk, a computer, and a chair. She was able to get up, move around, and take breaks, which sometimes relieved some of her symptoms.

When some other people changed offices she got one of their chairs. It was like a bowl with a flat seat. It was better than her old chair, but was not comfortable and had no adjustment for up and down, adjustable armrest, or lumbar support. She used this chair through the end of her employment, even though she asked Employer for a new chair every week.

⁴⁷ CX-9, page 50, is the fax Dr. Ortenberg sent to Employer in January 2003.

Employer had chairs that were similar to the ones at CX-9, page 53, and the kind Dr. Ortenberg prescribed, but she could not sit in them. Dr. Ortenberg said she needed lumbar support and a footrest. The chairs Employer provided had wheel casters and armrests, but one armrest was broken and not adjustable. The chairs did not have a height back adjustment. Al Kitzman brought a chair to her and she used that for the last two months that she was there. None of the chairs had a footrest like her doctor ordered. Employer never provided her with a headset.

Claimant experienced pain while working and sought treatment with Dr. Ortenberg, who treated her with trigger point injections. At times her legs hurt so badly she would just leave work. On several occasions she asked her boss to "cut her legs off."

On 27 Jun 03 she went to work and opened the desk drawer when a rat jumped out. It startled her and she ran away. She went to First Aid and got something to put on her back. The next day she went to see Dr. Ortenberg. Dr. Ortenberg gave her trigger point injections and a heat pack to lie on. He also told her to go home and take a break from work for a few days.

CX-15, page 84, has the limitations on her work. She remained in the paint warehouse even after those limitations were set.

Following the incident with the rat, Dr. Ortenberg sent Claimant for another MRI. He then sent her to Dr. Butler. Dr. Butler examined her back, asked her questions, and ordered a discogram. During the discogram, no one told her the order in which they were giving her the injections. All she knew was "one-stick," "two-stick," and "three-stick." The first one hurt. The second one hurt a little less, like a toothache or a headache. But the third one hurt really bad - if she could have grabbed him, she would have choked him.

When she went back to discuss her results, she told Doctor Dr. Butler that the last injection was the one that brought her pain. He told her that he could just remove the disc and do a fusion. Employer refuses to provide the surgery. If the surgery were offered today, she would have it. She takes medicine every day to control her discomfort. Employer sent her to Dr. Montz, but all she recalls is that he said he is "neutral" and thinks she should have a myelogram, which Employer has not provided.

Claimant moved to Ponchatoula in June or July of 2004 but continued working for Employer as a senior material analyst. Before she moved it took about 30 minutes to drive to work. Moving to Ponchatoula added considerable time to her travel. She has three children, but only the 18 year-old lives with her. The other two live on the Westbank. When she moved to Ponchatoula, she discovered the long commute caused pain, but she did not complain to anyone at work because she was the one who decided to move there.

Over the course of her treatment, she went to emergency rooms at West Jefferson Hospital, Tulane Hospital, and North Oaks Hospital. There were times when she could not feel her legs, and would fall down. Dr. Ortenberg refused to see her and made her go to the emergency room. Employer has not paid for any of those visits. Some of these charges are in collection.⁴⁸ On 16 Apr 04, the First Aid Department sent Claimant to Tulane Hospital, but Employer has not paid these charges either.

After Dr. Butler told Claimant all he could offer her was surgery, but because Employer would not pay for the surgery she tried to see Dr. Ortenberg. Dr. Ortenberg's staff refused to give Claimant an appointment because there was nothing Dr. Ortenberg could do for her. She then started pain management with Dr. Cargille.

By fall 2004, Claimant retained an attorney to get Employer to approve her surgery and pay some of her medical bills.

On 6 Oct 04, Al Kitzman, Claimant's boss, asked her to get him a drink on her way back from the sheet metal shop. She stopped at a vending machine, put a dollar bill in, got a coke, and retrieved her change. She then tried to buy another coke, using the change, but the machine would not accept the money.

Since the first machine would not work, she went to another vending machine by her office. When she put 60 cents into it, she noticed the door move. When she pulled on it to check, a group of people behind her saw it move. She took the coke she paid for and started to walk away, but people were opening the door and reaching in to take drinks. They handed her

⁴⁸ CX-13, p.1 and CX-13, p. 24 represent the charges and collection agency reports that remain outstanding.

more cokes. She took these drinks to her boss and told him the drink machine was open. He called the machine owners on speaker-phone and told them the drink machine was open. They said someone had already called about the problem. Her boss then put the drinks in his refrigerator.

Claimant left his office and returned to her desk. As she was heading out to wet dock 3 and the paint warehouse to check materials, her boss came out, laid the drinks on the top of her cubicle divider, and ordered her to return the drinks or she was fired. She answered that she would do it when she got back and put the drinks in the refrigerator to keep them cold for the people. Before leaving, she checked to see if the vending machine operator was there. Since he was not she headed out on her errand.

When Claimant returned about 30 to 45 minutes later, she saw the vending machine operator. Before she could return the drinks, a company security employee approached her, asked if she was "Tammy," and ordered her to come with him. She said she needed to give something back to the vending machine operator, but he insisted she accompany him to the security office. There, they asked if she broke into the coke machine. She told them no, it was already open. After she told them what happened, they said money was missing. They asked her to empty her pockets, and she obliged. They also asked her to empty her purse out onto a desk, which she did. Finally, they asked to look in her wallet and she allowed them to do so.

At that point, a human resources representative walked in. Claimant asked if she was fired and was told to return to work. She worked the rest of that day and the next.

On Friday, Claimant was taken to Kristen Barney, who works in human resources. Ms. Barney fired Claimant for theft. Claimant has not worked for Employer since.

Claimant found a small part-time job about a week and a half prior to the formal hearing. She works two to three days a week, a few hours a day, as a cashier at Speedy's. She earns \$ 5.25 per hour. Speedy's is a little gas station/convenience store. She does not stock shelves or sweep up. Her only duty is to stand behind the cash register and ring-up sales. She has a chair to sit on. She hurts, but is able to do the work and plans to continue working there until something better comes along. She still receives unemployment compensation.

She enjoyed her job with Employer, and had she not been discharged for the alleged theft, she would have continued working there. She does not think she had physical trouble maintaining her job position, even though she was always hurting. Some of her meetings took place on ships until she finally told Employer she could not climb aboard the ships. As a result, Employer switched to meeting on land.

Al Kitzman testified at trial⁴⁹ that:

He has worked for Employer for about seven years and is currently the section manager of Shortage Control for Northrop Grumman Ship Systems. Mr. Kitzman has known Claimant for two years. They first met when he was a project coordinator in charge of one ship and she was his assistant. Claimant updated bill reports. She sat at a desk and moved around as needed. At times, she ran errands, using a golf cart. She could also take cigarette breaks.

Mr. Kitzman first noticed Claimant's physical problems shortly after she started working with him because she complained about her back. At that time, she did not ask him to do anything to facilitate her ability to physically do her job. She was very bright and attentive on her good days. At first she was real "green," but she picked up things faster than he thought she would.

In July 2004, he was promoted to his present position as section manager.

Mr. Kitzman maintained daily contact with Claimant. She never asked him specifically for a chair while he was her section manager, but did mention she was trying to get a lumbar or orthopedic chair. She advised him that she was working with the Safety Department and First Aid regarding a new chair, but she could not get one. Claimant did not ask him to facilitate her request or try and work it out while he was her section manager.

The circled chair on the lower right of CX-9, page 53 looks like the one Claimant had. While he was her coordinator, she complained about her chair, and he did everything to accommodate her. Employer got her other chairs, trying to make her more comfortable. At Christmas, Mr. Kitzman bought her a back massager.

⁴⁹ Tr. 127-148

Once he became section manager, Claimant did not approach him anymore, even though she could have. Although the chairs available to Claimant had adjustable armrests, they were not specifically obtained for Claimant. In addition, he knows of no footrest or headset being made available to Claimant.

Prior to her termination, when Claimant was actually at work and not “preoccupied with personal problems,” she was a good worker. He was aware that she had ongoing back and personal problems. For instance, Claimant was warned about using the telephone too much because of her personal problems.

On 6 Oct 04, at around 8:30 or 9:00 A.M., Claimant asked him for a quarter to get a cold drink. He gave her some change and asked her to get him one, also. A few minutes later she came back with an armload of cokes, saying the vending machine was open. She put six sodas on his desk and said she was going back for more. He immediately grabbed the cokes, put them back on her desk, and told her to put them back or she was fired. She asked if he was serious and he replied that she was “dammed right” he was serious. She said she would return them. She did not tell him she had to wait until the coke guy showed up to give the cokes back. She was present when he called the vending machine company. He did not use the speaker phone, but she could have heard him from her desk.

About one-half hour later, a security guard came to the office looking for Claimant, but she had already left in the golf cart. Security asked him to look in the icebox to see if there were more drinks. There were eight more cokes in the icebox. The icebox belonged to another employee, who only drinks diet coke. He found regular cokes, like the ones Claimant brought him. As he gathered the cokes to take to Security, he went in the back to look for a bag, and saw six more drinks. They were on a desk in the back part of the office where nobody worked.

When Claimant returned 30 to 45 minutes later, the security guard escorted her to the security office. After about an hour she came back to work. Claimant was terminated for theft about two to three days later. It is standard procedure for an employee to continue working during an investigation.

Mr. Kitzman feels there was reasonable cause to discharge Claimant for theft.

While he was a project coordinator, there was an incident between him and Claimant. He had just gotten off the phone with Claimant because she asked him to come to the gate and get her. He said to whoever was in the office at that time, "Oh, it's that crazy bitch, Tammy." He denied actually thinking that about Claimant, though. He and Claimant went to their boss and worked out their problems. He apologized, told her he did not mean it, and asked her forgiveness.

At times, her back problems affected her work and she would go home because her back was bothering her. Someone else would have to take over her workload.

Claimant's job position was not new, and existed prior to his arrival. It has not been refilled since Claimant's termination because of a hiring freeze. There were no layoffs in his section but he cannot fill two positions because of the freeze. Employer has had some layoffs, mainly in support personnel.

Glen Weber testified at trial⁵⁰ that:

He has worked for Employer for 19 years and is currently a project coordinator. He follows-up on material shortages. Mr. Weber was Claimant's co-worker and he has known Claimant for three months. Claimant did what she had to do and was competent.

One day while working at his terminal, Mr. Weber observed Mr. Kitzman walk up to the side of the partition that divided the offices and start handing coke after coke over the top until he passed about six of them. He overheard Mr. Kitzman tell Claimant to take them back or she was fired. He also heard Claimant ask if he was serious, Mr. Kitzman responded that he was and walked off. Mr. Weber testified Claimant said she would take his back, but not hers. Then she walked out of the office with the six cokes that Mr. Kitzman gave her.

Robert Lambert testified at trial⁵¹ that:

He works for Employer as an investigator. He was a New Orleans policeman for 24 years and retired in 1997. He was the head of security for the racetrack for two years and chief of detectives for a sheriff's office for three and one-half years before joining Employer.

⁵⁰ Tr. 148-153

⁵¹ Tr. 153-173

One of the security officers received an anonymous phone call that Claimant was seen removing some items from a vending machine. Several people were interviewed, including Claimant.

During her interview, Claimant informed Mr. Lambert that she had left her office on some business and was going to stop and get herself and her boss a soft drink on her way back. She stopped at a vending machine, put a dollar bill in, and got one soft drink. The machine would not take her change, so she tried another vending machine closer to her office. She noticed the machine was open and removed five cans from the machine to show her boss. When asked why she removed the drinks to show her boss, instead of just telling him, she responded she thought it would be better to bring the soft drinks to him.

Later in the interview Claimant stated somebody else gave her the soft drinks, but she could not recall who. After the interviews were completed, he submitted his report to Human Resources. The investigation determined 35 drinks and money were missing from the vending machine. There were other people removing soft drinks, but nobody would identify those people. Claimant's purse and wallet were searched and no money was found. Mr. Lambert discussed his findings with Kristen Barney, the generalist from Labor Relations.

Kristen Barney testified at trial⁵² that:

She works for Employer as a human resources generalist. She oversees Human Resources matters for the site, works on employee relations, hires staffs, labor relations, and general Human Resources matters of any nature. Her boss is the vice president of Human Resources for the Ship System Sector and she is one level away from the vice president. She has the authority to make decisions regarding discipline and termination.

Ms. Barney first met Claimant some time ago when Claimant's husband came into her workplace in violation of a potential restraining order. She next encountered Claimant in August 2004 in the course of the issuance of a warning notice for attendance problems and personal telephone usage. Claimant's supervisor, Al Kitzman, issued the notice. The amount of time she missed from work, whether for late arrivals, full day absences, or early departures, was above and beyond what was acceptable for the company. Ms. Barney met with Claimant and Mr. Kitzman. They talked about why there were so many absences and Claimant's personal phone call usage.

⁵² Tr. 174-203

They put Claimant on a probationary period, monitoring further attendance issues. Claimant mentioned her back problem and that it is difficult for her to get to work on time.

After issuance of the warning notice, Claimant's attendance declined. Mr. Kitzman advised Ms. Barney of continued absence problems and that Claimant's phone usage improved slightly, but not enough. They decided Claimant needed verbal counseling sessions to give her some feedback and time to improve over the following 120 days.

Her next interaction with Claimant involved the theft of the cokes from the vending machine. Ms. Barney received the investigation report from Security. She reviewed the information and decided there was enough evidence to support a determination that Claimant stole multiple drinks out of the vending machine. Theft is an immediate discharge offense for Employer. It is written in the Employees' Guide Book. On 8 Oct 04, she told Claimant about the findings and terminated her. Claimant had the right to appeal, through a process called dispute resolution, but she did not.

Ms. Barney knew of Claimant's back problems, but was not aware of any issues about a chair.

There is not a not a freeze on hiring, but there is a freeze on "indirect positions." An indirect position is a position charged to an overhead account, while direct employees are charged to a job number. If Claimant was in a "direct position," they can go through a special approval cycle, asking the Vice President for approval to replace the position.

Dot Moffett-Douglas testified at trial⁵³ that:

She is a vocational rehabilitation counselor licensed in the state of Louisiana, tendered as a qualified expert in the field of vocational rehabilitation counseling. She has a Master's in counseling from Louisiana Tech University. She worked as a vocational counselor with the Louisiana Department of Labor for 20 years and in private counseling as a licensed rehabilitation counselor for approximately 14 years. She belongs to the Louisiana Rehabilitation Counseling Association and the International Rehabilitation Counselor Association.

⁵³ Tr. 204-224

Mrs. Moffett-Douglas received Claimant's file on 30 Oct 04. Employer asked her to visit the job site, look at the job of material analyst, and perform a labor market survey based on the records in the file. She arranged to meet on site with Al Kitzman to determine if the job was within Claimant's restrictions as by Dr. Montz and Dr. Ortenberg and analyze the job duties.

She reviewed the restrictions set by Dr. Montz and Dr. Ortenberg, met with Mr. Kitzman, and compiled a job analysis. When she did her initial analysis, Mrs. Moffett-Douglas was unaware of an issue about providing Claimant with an orthopedic chair. She did not meet Claimant until the day of formal hearing.

She understood the restrictions Dr. Ortenberg placed upon Claimant to include no lifting over 25 pounds and light duty only. She looked at the materials Claimant would be working with, the computer terminal and the paperwork at her desk. She looked at Claimant's chair and sat in it. The job fell below light duty into sedentary.

She also reviewed Claimant's personnel records to determine whether Claimant had any transferable skills. The senior material analyst position was suitable employment within Claimant's medical restrictions, educational background, and work experience. Based on her past work experience and the restrictions set by Dr. Ortenberg, Ms. Moffett-Douglas believes Claimant is capable of working in the senior material analyst position.

Mrs. Moffett-Douglas later called Al Kitzman to ask if Claimant received a new chair. He advised her it had not been ordered for her specifically, but she was given an adjustable gray office chair, which seemed to be darker on the seat part than on the back. It had wheels and was comfortable with lumbar support.

She completed two labor market surveys. Based on those surveys, there are other clerical positions available within the geographical area of New Orleans and Hammond. The pay ranges from \$5.25 to \$9.00. The jobs have an average pay of \$7.45 per hour for a full-time, 40-hour week and are available both near Employer and closer to Claimant's home in Ponchatoula. These positions were available at the time of the survey and are within her medical restrictions. Claimant could do them based on her educational background, work experience, and medical restrictions.

Mrs. Moffett-Douglas was aware that Dr. Butler recommended surgery and both Dr. Ortenberg and Dr. Butler believe Claimant needs to be under constant medical care of a pain control physician. She was also aware Claimant was already terminated when she met with Mr. Kitzman, but did not sense any animosity between Mr. Kitzman and Claimant when Claimant worked there. She was not aware of the specifics of the chair Dr. Ortenberg ordered for Claimant or that Claimant was prescribed a telephone headset and did not take those restrictions into consideration. However, even taking that into consideration, her opinion remains that Claimant could continue to work as a senior material analyst.

Doctor Donald Adams testified via deposition⁵⁴ that:

Dr. Crapanzano referred Claimant to Dr. Adams for a second opinion and an EMG. He is a board certified neurologist and saw Claimant regarding her claim on October, 15, 22, and 29, 2001. On her initial visit, Claimant told him she was initially hurt working in Employer's Painting Department in 1999. She informed him that she developed back stiffness that had cleared up, and she thought she made a full recovery. He did a physical examination, consisting of a standard neurological evaluation of her complaint of back and leg symptoms. He checked to see if the mobility in her lower back was normal and if there were any muscle spasms. He also examined her legs to see if strength, sensation, and reflex functions were normal. He did not find anything that raised concerns. The only questionable item was some patchy change of sensation in her legs that did not have a specific meaning. The sensory exam can be difficult because it requires individual perception and depends on the reporting of the individual for the results. It cannot be seen or measured objectively. Claimant reported some apparent changes in sensation, but in a pattern that would not correspond to the distribution of a peripheral nerve or a lumbar nerve root. Therefore, the significance of the finding would be uncertain and would not necessarily have any specific meaning. All objective findings were normal.

He recommended a Nerve Conduction Study and EMG. They were conducted on 22 Oct 01, and were completely normal.

⁵⁴ EX. 25

On 29 Oct 01, Dr. Adams conducted a physical examination that was also completely normal. Claimant's complaints were the same as those at her original examination on 15 Oct 01. She had pain and painful numbness radiating into both legs that increased with activity. In particular, she described pain radiating into the back portion of the upper leg, roughly down to the area of the knee.

During her physical examination, Dr. Adams noted a 27 Aug 01 MRI scan of the lumbar spine showed what was described by the interpreting neurologist, Dr. Patel, as an "old mild wedge compression deformity involving the T-11 vertebral body." He did not actually read the MRI films himself, but trusts Dr. Patel's reading. Small changes as reported are most commonly a result of some form of trauma in which there was blunt trauma, such as an individual falling and landing on their feet transmitting force into the spine causing a small loss of height of the body of the vertebrae. Claimant's 11th thoracic vertebra is not as tall as it should be, probably because of wedging or slight compression of the vertebral body that occurred at some time in the past, but healed by the time the MRI was done. Otherwise, the MRI was normal.

Dr. Adams concurs with Dr. Miranne's opinion and denied seeing any objective findings explaining Claimant's pain. He believed Claimant attempted to control test results and her results only reflected what she was willing to do, not what she could do.

Based on his objective findings, Dr. Adams would not place any type of work restrictions upon Claimant. She demonstrated no physical abnormality or restricted range of motion during her examination. A "small-wedged deformity" of a vertebral body, by itself, would not result in any impairment rating under the generally-accepted criteria. Based on her objective physical examination, he saw no reason to restrict her work activities or what she could perform on a daily basis.

Dr. Adams is not a surgeon, but has practiced medicine and neurology for many years. In general, surgery is done to correct some structural abnormality in the body that's causing symptoms. Since Claimant had a normal MRI Scan in terms of the neuroforamen and the disc, along with a normal physical exam and a normal EMG, there was nothing apparent that could be improved by surgical intervention.

It is not unusual for problems that do not rise to the level of causing significant abnormalities on exam or significant disability to be treated by neurologists and pain management specialists without bringing in a surgeon. Literature would indicate the vast majority of overt disc problems, for example, resolve without requiring surgery. Surgical opinions are obtained when conservative treatment fails, when there are abnormalities on exam, or when a patient is seen initially by a surgeon.

After examining Claimant, Dr. Adams did not believe Claimant needed a referral to a neurosurgeon. She already saw a neurosurgeon, Dr. Miranne, who did not recommend surgery. Dr. Adams concurred with Dr. Miranne's opinion.

When Claimant originally saw Dr. Parnell, she had muscle spasms in her back. She lost some of the normal curvature in the back from that time frame, which would not be surprising.

The MRI scan conducted in August did not show any significant arthritis. As people age, they develop some bone spurring and other changes well-demonstrated on an MRI. An MRI, however, does not show bone density as well as other studies can, but that is not the same thing as arthritis. The MRI scan gives a fairly good idea of whether arthritic change is present in the back, and the MRI noted no arthritic changes in Claimant's back. It is perfectly reasonable to assume Claimant had a back strain. Those are common and that is what was described. The natural history of a back strain is to get better and go away. When Dr. Adams saw her, he certainly did not see any abnormal mobility in her lower back.

While he is not technically an expert in the field of orthopedics, medicine does not pigeonhole and there is a lot of overlap between Physical Medicine, Rehabilitation, Neurology, Neurosurgery and Orthopedics

Dr. Adams has not seen any of Dr. Ortenberg or Dr. Butler's records and cannot comment on what their opinions are. He is not aware of any controlled or objective evidence in the medical literature demonstrating the accuracy of discograms. There may be neurologists who use discograms as part of their practice, but he does not know any. Discograms are normally administered by radiologists or pain management therapists. He does not know what professional qualifications are actually necessary to perform a

discogram. Cases where the health care provider who is administering the discogram and the patient differ on what was actually reported have led to concerns about the accuracy or reproducibility of findings that correlate with abnormalities on exam.

He does not know anything about Claimant's history beyond her last appointment with him.

Doctor John Montz testified via deposition⁵⁵ that:

He is in private practice as a Board Certified Orthopedic Surgeon. He first saw Claimant on 27 Apr 04 for an independent medical evaluation at the request of FARA Insurance. It asked him to evaluate her lower back complaints related to an on-the-job injury and to give an opinion regarding treatment she already received and what treatment she might need in the future. He did not review any records before he saw her.

Dr. Montz informed Claimant it was an independent evaluation, that he was not working for anyone, and that various people, including judges, insurance companies, and lawyers ask him to do such evaluations and give his opinion. During her examination, he obtained her history, did a physical exam, reviewed diagnostic tests, and reviewed her medical records from other physicians.

Claimant gave Dr. Montz her history that she first injured her back while working for Employer as a painter. She was sanding a portion of a ship in October 1998, when she fell off of a pipe three feet into a tank and landed on her back. Other employees helped her up and sent her to the First-Aid Department where X-rays were taken. She went back to work that day. The next day she had severe discomfort and returned to the First-Aid Department. They took additional X-rays and sent her back to work, which she performed in spite of periodic episodes of back pain.

She informed him of a second injury which occurred in July 1999, when she worked in a confined space and developed severe back pain. She was carried off of the ship by other employees and taken to First-Aid, where she was ordered to stay off of work for two weeks.

⁵⁵ EX-26

Claimant returned to work until March 2000, when she moved a heavy object under a ship. After a week of doing moving heavy objects and cleaning up, she developed severe back pain, causing her to miss work for another week.

She also informed Dr. Montz that in June 2000, she was pulling ventilation components and developed a back pain flare-up. She continued working for three days, despite her symptoms, until her back and leg became so painful that she returned to the First-Aid Department and was kept off work for about four months. She saw the company physician, who performed an MRI and sent her to Dr. Crapanzano, a Pain Management Anesthesiologist. She underwent about six epidural steroid injections, which brought her no relief.

Claimant also related that in October of 2000, she returned to work on a light-duty status, but was required to sweep and do other activities that aggravated her back pain. She did this for about two to three years despite her back pain. She was told that there was no possibility of advancement in that job and transferred to a position as a senior material analyst, which would allow her to sit for prolonged periods. She reported episodes of severe discomfort and was off from work for two weeks at a time. She saw Dr. Ortenberg, who ordered an orthopedic-type chair, but she denied ever receiving one. She said her symptoms got progressively worse and a friend referred her to Dr. Butler at Tulane Hospital. Dr. Butler was her treating physician at the time he conducted her April 2004 exam. Claimant reported a prior discogram and that surgery had been recommended. She informed Dr. Montz she takes prescribed Lorcet, Flexeril, and Lexapro.

In April 2004, she presented symptoms of severe lower back pain that mostly involved the left leg and pain that radiated down her buttocks to the posterior lateral leg, occasionally going into her foot. She reported tingling in her left foot and weakness in her left leg. She further reported that occasionally, both legs were painful and she had fallen on several occasions -- once three times in one week. She reported frequent bouts of diarrhea and occasional episodes of urinary incontinence.

Claimant indicated she felt that the four injuries were all incidents resulting in lower back pain and together were the cause for her current symptoms.

After receiving Claimant's complete history Dr. Montz examined her. She was five foot three, one hundred seventy-four pounds. She used a walking cane. The exam started with her lying on her side on the examining table. She rose to a sitting position, but reported discomfort when she did. Her lumbar exam showed tenderness to moderate palpation in her lower back, but not to light touch. She could flex forward 45 degrees with complaints of pain. She extended to a neutral position with pain and bent laterally 10 degrees with pain, as well. There was tenderness in her lower sacral area, worse on the left side. There was no sciatic notch tenderness. When she stood on each leg (a test to determine if there are muscle spasms) he could not palpate spasms in her back. A straight leg raise caused her back pain, but no pain down her legs. The straight leg raise is mainly significant if it causes pain down the leg, in which case the test is positive, which means the nerve from the spine down the leg is inflamed, possibly from a ruptured disc. Claimant's test was negative.

Claimant's motor and sensory exams in her lower extremities were normal. Her reflexes were symmetrical and within normal limits in her lower extremities. Her thighs and her calves were the same size bilaterally and there was no atrophy. With long duration of nerve root compression, one would expect that there could be atrophy.

Dr. Montz reviewed her lumbar X-rays, which showed mild spurring at L4 anteriorly. The disc spaces were of normal height. There were no fractures, destructive lesions, or other significant bone abnormalities. Her pelvis X-rays were normal, as well. An MRI film from Memorial Medical Center showed a small herniated disc at L5-S1, but without evidence of it compressing a nerve root.

It is possible to have a herniated disc without impinging on the nerve roots. A large percentage of MRI films show herniated discs and the individual may not even realize it. Common causes of lower back pain are herniated discs or degenerative discs. If a nerve root is severely compressed by a herniated disc and the patient has pain down her leg and that pain is unrelenting or there is progressive weakness, surgical intervention may be considered. A herniated disc, by itself, does not necessarily require surgical treatment.

Claimant's weight would not have caused the small herniated disc at L5-S1, but would aggravate it. There is an inherited component, a component of lifting properly, and a certain amount of luck involved in whether or not a disc is herniated. A herniated disc can result from a bad coughing spell or from just bending over to pick up a newspaper.

The small herniated disc without nerve root impingement on Claimant's MRI would cause back pain. He thinks there is enough disruption, at least of the disc, to cause back pain and that it could have been caused or aggravated by the incidents Claimant described.

He reviewed the discogram film and saw well-confined opaque material in the L5-S1 disc and diffused extension of the material at L4-5. A discogram is a controversial test, which looks not only at the film, but also at the patient's response to the injection. Just looking at the film itself has questionable value.

The well-confined opaque material at the L5-S1 did not reconcile with the MRI, which showed a small herniated disc. Similarly, the L4-5 seemed to be more diffuse, yet the MRI suggested no abnormalities at that level. Claimant's MRI and discogram were inconsistent.

Dr. Montz also reviewed the medical records that were sent to him. Dr. Adams conducted electrical studies on her lower extremities and stated they were normal. His evaluation of her lumbar spine MRI showed no compression of neural elements. Dr. Adams determined there were no objective findings of significance on his clinical exam. Dr. Crapanzano's notes reflected Claimant received multiple injections in the epidural and facet spaces, with no significant improvement. Dr. Crapanzano felt Claimant was depressed and recommended she see a psychologist, Dr. Bianchini. Dr. Ortenberg's notes indicated multiple visits and conservative treatment, but no objective findings explaining Claimant's subjective complaints. The 27 Aug 04 MRI report diagnosed an old wedge compression, a mild bulge at L5-S1, a possible incomplete annular tear, and mild facet degeneration.

Dr. Butler's notes ordered Claimant undergo a discogram. The radiologist reported a discrepancy between the radiologist's interpretation of what the Claimant reported and Claimant's response. In other words, the patient should say (before the disc in question is injected) that it hurts and after the injection of Xylocaine that it does not hurt. This gives credibility to the test. Dr. Butler's notes showed tenderness in her lumbar spine, but no

spasms. He had a positive straight leg raise on the left. He also reported limited range of motion of her spine. Based on his exam, Dr. Butler recommended an L5-S1 fusion and discectomy.

If the electrical tests were positive for an S1 nerve root problem, everything looks like an L5-S1 ruptured disc, and the patient says it hurts, the patient may be a good candidate for surgery. In Claimant's case, the electrical studies were negative and the neurologist could not determine whether there was any nerve damage. The negative electrical studies are consistent with the MRI, which shows a small herniated disc, but no nerve root impingement. Claimant had a negative straight leg raise and no atrophy. There is no reason to suggest Claimant needs surgery under these circumstances.

Claimant's only contrary indications were that the MRI showed a small herniated disc, but no nerve root compression. The radiologist did not feel that the discogram was accurate. Moreover, Claimant was diagnosed as depressed and recommended for psychological evaluation.

Based on Claimant's history, his review of her medical records, and his examination of Claimant, Dr. Montz believed she needs a psychological evaluation, including an MMPI, a test to determine whether secondary gain or depression influences symptoms. In addition, he suggests that a lumbar myelogram and post-myelogram CAT scan be considered. He also felt Claimant could do a job with no repetitive bending or lifting over 25 pounds.

Dr. Montz based Claimant's work restrictions primarily on subjective complaints. Claimant is capable of light-duty or sedentary work, such as secretary work, dispatcher, or a guard who walks different distances. She should not lift more than 25 pounds or push or pull more than 50 pounds.

Claimant would need to get up least once an hour and walk around. He also noted that an orthopedic chair might benefit her. Most of the orthopedic chairs have a lumbar roll or a portion supporting the lower back and possibly elevating the legs so the knees are slightly higher than the hips. They are adjustable so the patient can find a comfortable position. He does not know if the orthopedic chair would help Claimant, but it is worth trying if it helps Claimant tolerate a sedentary job. Claimant is capable of working if she can get up once an hour and walk around.

Dr. Montz next saw Claimant on 9 Dec 04, for a second clinical exam. This time she walked without a walking aid. During her lumbar exam, she flexed 45 degrees with pain, extended and laterally bent 10 degrees with pain. She had no tenderness to very light touch, but did have tenderness to deeper palpation in her lower back. She could stand on either leg, and he found no spasms. Her motor and sensory exams in her lower extremities were normal. He conducted a straight leg raise, which was negative. Her reflex was also normal. Her thighs and calves remained equal in size. There were no pathologic reflexes. Dr. Montz tested for clonus, bringing her foot back suddenly while seated, and she reported a shocking pain in her left buttocks, which is inexplicable.

He reviewed additional medical records. In 2000, Dr. Parnell noted Claimant's normal neurological exam in the lower extremities, even though her complaints persisted. Dr. Parnell referred her to Dr. Miranne. Dr. Miranne's 2001 notes confirm that the MRI of the lumbar spine was normal. Dr. Miranne recommended pain management and sent Claimant to Dr. Crapanzano. Dr. Crapanzano's referred Claimant to Dr. Adams. Claimant was also referred to a psychologist and apparently treated with Dr. Greve, who indicated Claimant had a pain disorder with both a psychological factor and general medical condition. Dr. Greve diagnosed depression, recommended psychotherapy treatment, and prescribed Remeron. Dr. Montz has not talked to Dr. Greve about his report or findings and has not had a chance to fully review Dr. Greve's report.

After reviewing all of Claimant's records and performing the second exam in December 2004, Dr. Montz's opinion remained unchanged - Claimant is not a surgical candidate. He testified that having significant depression, in part, makes Claimant a poor surgical candidate, especially for spine surgery with minimal findings. Claimant needs further psychiatric workup in the form of an MMPI and a Functional Capacity Evaluation. If the MMPI is negative for secondary gain or psychiatric problems, then a myelogram and post-myelogram/CAT scan should be done, for surgery to be contemplated.

Claimant should be treated with work and activity restrictions. She needs therapeutic exercise, diet, weight reduction, consideration of the back brace, and managed medications for her to work.

Doctor Edward DeMouy testified via deposition⁵⁶ that:

He graduated from Louisiana State University Medical School in 1957 and became board-certified in Radiology in 1964. For the past 15 or 16 years, he has been at Tulane Hospital in Radiology. His subspecialty is Bone and Joint Radiology/Orthopedic Radiology. He is also a Professor of Radiology and a Professor of Orthopedics.

A discogram is a procedure in which under X-ray guidance a needle is placed into a disc; in Claimant's case, the lumbar disc. Its position is confirmed, and then a small amount of contrast material is injected into the disc. A healthy disc usually takes only one or two milliliters. If the patient has a normal disc, there is no pain, just discomfort from the needle. If the patient has a degenerated disc, pain may develop with the injection. If the patient has pain from a herniated disc, that pain is clinically reproduced when the herniated disc is injected. It is critical that the patient have pain from a suspected disc prior to the exam and that the pain be completely and positively produced upon the injection, before the herniated disc can be considered the source of the patient's pain or symptoms.

Normally the test includes three disc levels. The first disc level is called a control, usually a disc that is unlikely to be involved with any injury. In Claimant's case, it would be L3-4. If the patient has pain upon injection into the control, (and she may not) it is probably not the type of pain that brought the patient into the hospital. The patient does not know which disc is being injected because she is lying prone on the table. If the patient has no pain, it is a normal control. If the patient has pain, it is not the pain that caused her to come into the hospital.

After the control, the discs associated with the herniation are tested; in Claimant's case L3-4 and L4-5. The patient is not told when the injection is done, but does report when, where, and how much pain she feels. When there is a report of severe pain, the herniated disc has been identified. The test is designed to clinically reproduce the pain that brought the patient to the hospital. Since the doctor's hands have to be sterile, a technician normally notes the patient's reports of pain. The doctor transcribes those notes into his report and the technician's notes are then discarded.

⁵⁶ EX-30

People with herniated discs may have no complaints at all. Most people over 30 years old have degenerated discs. This is a normal feature of aging. A simple bulging of the disc generally does not cause pain.

When discograms first became a diagnostic tool, it was unclear what a positive discogram was. Degenerative discs are part of normal aging and generally do not cause trouble. It is critical that whatever type of pain the patient initially complains about is exactly reproduced with the injection. The test must be done without the patient knowing they are being injected. Otherwise, it can be misinterpreted.

It may be best for the radiologist to not know what type of pain the patient has and leave that to the clinician. If the patient reports left leg pain upon injection, but it was right leg pain that brought her to the doctor, it is still a negative study.

Claimant experienced pain at the control level and at the L5-S1 level; neither corresponded with her clinically-presented pain.

Dr. Newsome, a Board Certified Radiologist taking additional training at Tulane, conducted Claimant's exam. He discussed it with Dr. DeMouy, who signed off on the discogram.

Disc L3-4 was injected first and served as the control level. When injected at this level, Claimant had severe pain. The pain was not concordant with the pain she presented to the department in the first place. At the next level, L4-5, Claimant had no pain on injection. With the last injection, at L5-S1, Claimant experienced severe pain of "10 out of 10." She reported the pain was different than what she usually experienced. Consequently, Claimant had a negative study.

A discogram is very good for identifying the location of a herniated disc that is causing problems. Discs may appear herniated in X-rays or myelograms, but not cause any pain or be clinically significant. If there is more than one herniation, the discogram can identify which one causes the pain. The discogram is only one of the modalities for diagnosing disc disease. There are also plain X-rays, myelograms, MRIs, CTs, and the clinical exam, which is very important.

There are different opinions as to the efficacy of discograms in treating patients. Much of the criticism comes from a misunderstanding of the Holt study. Holt studied prisoners in a Minnesota penitentiary, even though none of them had back pain. Holt performed discograms on them, produced pain in a number of them, and called the tests positive. By definition, the tests cannot be positive if the patient does not have pain prior to the exam.

Nonetheless, Dr. DeMouy believes discograms are valid and should be used before surgery to make sure the right disc is identified. The discogram is one of the few exams in Radiology that depends upon reproducing pain for a positive result. Doctors generally do not like to hurt people, but there is a subjective component to the discogram, which is why the time and location of each injection is kept from the patient.

Dr. DeMouy testified that Dr. Newsome is very disciplined and extremely consistent. When Dr. Newsome examines a patient like Claimant, he makes certain that he reports exactly what the patient says about her pain. Dr. DeMouy would be more inclined to accept Dr. Newsome's findings, if Claimant later said her pain was different than what was recorded.

Dr. Newsome's report shows that at L5-S1 Claimant stated that "if" this pain is different from what she usually experiences. Dr. DeMouy believes that this is a typo, because it does not make sense. Dr. Newsome's statement that there was no concordant pain at this level is more significant. His report can be partially corroborated through the images taken to verify the location of the needles, which were completely in order.

A lesion at L3-4, by itself, would not reduce its usefulness as a control level, since the control level may produce pain, just not the pain that brought Claimant to the hospital.

Dr. DeMouy knows Dr. Butler from the Tulane Hospital faculty. He testified that Dr. Butler is a "very fine orthopedic surgeon." Dr. DeMouy has not reviewed any of Dr. Butler's medical records on Claimant. Even if Dr. Butler's notes report that Claimant told him she believed the pain was reproduced exactly by the last injection, he would still trust Dr. Newsome's report, since it was dictated at 1:44 p.m. on the date of the exam, with no lag time.

Doctor Kevin Greve testified via deposition ⁵⁷that:

He is a clinical psychologist in private practice since 1996 and licensed since 1997. Dr. Greve has been on the faculty at the University of New Orleans, full-time, since 1991. Dr. Crapanzano referred Claimant to him for a determination of whether she had any psychological factors causing her back pain.

Dr. Greve gets six or seven referrals per year from Dr. Crapanzano. When he gets a referral, he generally asks Dr. Crapanzano for his records, along with the case adjuster files, if it is a Workers' Compensation case. He then sees the patient for one full day of evaluations. Often, as in Claimant's case, he also does an interim summary that provides pertinent clinical information.

On April 10th, Dr. Greve completed a full evaluation of Claimant. He sent a written interim summary to Dr. Crapanzano on April 14th, but did not speak to him until April 18th. On May 1st, after he completed his report, Dr. Greve discussed the results with Claimant and gave her feedback. He has not had any contact with Claimant since May 1st.

Prior to examining Claimant, Dr. Greve only reviewed fairly recent records from Dr. Crapanzano's. He requested other records, but never received them. As a result, his report is based primarily on his clinical evaluation, which included some testing and some records from Dr. Crapanzano. His testimony is primarily based on his review of his actual report, not his independent memory of Claimant.

Dr. Greve's evaluation of Claimant combined three sources of information: the medical records, his interview with Claimant and her subjective reports, and testing. The testing is designed to evaluate functional psychological areas that can be affected by pain or can complicate problems with pain. He does not do a physical evaluation, but evaluates the patient's physical complaints, emotional state and cognitive functions. The interview usually takes about one hour and the testing can be completed in the equivalent of one day after that.

Psychological factors can delay recovery from an injury. This includes depression and anxiety, as well as, problems that fall under the general heading of "somatization." Somatization is a coping style or tendency for the patient to talk about their emotional problems in physical terms or

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express emotional distress in physical terms. Instead of saying, "I'm sad" or "I'm depressed," they say, "my back hurts." or "I've got problems with my stomach." These patients may manifest physical symptoms under stress, which will then cause more stress. These patients do not cope with the stress well, and may develop stomach problems or bowel problems. These psychological factors can increase muscle tension, as well.

Depression can make the pain worse. Comparing two people with equivalent injuries, one who is depressed and one who is not, the one who is depressed would complain more about pain and may be more sensitive to the pain that they both have.

Somatization and depression both complicate recovery, because they are psychological factors that do not respond to physical treatments. Sometimes, however, the physical treatments are effective and the patient feels better; thus, his or her psychological factors will also get better.

Other behavioral or psychosocial factors can contribute. Those include factors surroundings and upbringing. Chaotic upbringing or physical/sexual abuse are both strong predictors of poor outcome from physical treatments such as back surgeries.

If a patient's depression and anxiety are not treated, and the patient's treatments focus largely or exclusively on her physical factors, treatment will be less effective. The patient will appear more functionally impaired.

Claimant provided Dr. Greve with about a four-year history of work injuries. Some were fairly significant, while others were minor. He noted a striking feature was that she went back to work after each injury and described herself as being "very motivated" to return to work. Claimant advised Dr. Greve she believed this probably contributed to her June 2000 injury, when she went back to work even though she was not healed. She did not get a sense of satisfaction from light duty work. She received injections from Dr. Crapanzano who was also concerned about Claimant's psychological state.

Claimant also described a fairly high level of lower back pain. She talked about insomnia, weight gain, crying easily, and family stress that she believed related to how she was responding to her injury. She was irritable and reported decreased interest in activity and sex because of her pain. She reported minimal cognitive problems. Although she described memory problems, she admitted it could be because she just was not paying close attention. She also informed Dr. Greve she felt she does not communicate

clearly. In addition, she reported depression and anhedonia, which is a loss of interest in life and activities. She denied having guilt, self-criticism, anxiety or suicidal thoughts. She reported several stressors, including quitting smoking and buying a house. She related taking an antidepressant, Remeron.

Dr. Greve understood that Claimant's record showed some degenerative lumbar or lumbosacral disease and some bulging at the thoracic level. Claimant completed a comprehensive battery of tests.

The first test was the Neurobehavioral Cognitive Status Exam, a formal mental status exam. It is a very brief screening, assessing broad areas of cognition. Claimant performed completely normally on this exam.

Claimant also took the Wechsler Adult Intelligence Scale test, a commonly used intelligence test. Claimant's overall intelligence scores were a little bit low, especially her verbal ones, but her high level of concentration, attention, and processing speed, were in "real good shape." Her full scale I.Q., an overall composite, was in the low to average range.

Claimant also completed the Wide Range Achievement Test, a reading test, and also scored in the low to average range.

On the California Verbal Learning Test, a multiple trial word list learning test, Claimant scored in the moderately impaired range.

In addition, she completed a Word Recognition Test, on which Claimant scored normally.

On the Portland Digit Recognition Test, Claimant was presented with a series of digits and then had to pick which one was the right one. Claimant did fine on the easy items, but on the hard questions, she scored "worse than what real brain damaged people do." Dr. Greve believed she did not even try, which concerned him. She consistently picked the wrong one. He did not make much of this in his report, but the report suggested she clearly did not give "good effort" at the end of the test.

Claimant also took the Word Memory Test, a very complex forced choice test, which she performed fine on.

Although there is clearly a suggestion that she gave a poor effort on the Portland test, for whatever reason, she performed well on the other tests. In the absence of suspicious findings in other domains, Dr Greve is not concerned. He does not make any diagnoses based on a single finding, and did not have enough information to make a diagnosis of cognitive malingering. If Claimant showed exaggeration of psychological or physical symptoms on the MMPI, these findings would have been enough for a malingering diagnosis. However, just because Claimant did not do well on the last segment of the Portland Digit Test does not, in and of itself, support a diagnosis of malingering, in light of the fact that she completed the other tests adequately.

Claimant also completed the Minnesota Multiphasic Personality Inventory, which evaluates current emotional state. The test indicated Claimant was not exaggerating psychological symptoms or physical symptoms. It was a clean MMPI, showing a little bit of concern over physical functioning, a little bit of depression, and borderline anxiety.

Claimant is a dysthymic individual. Dysthymia is a chronic, ongoing depressive style, such as a person who tends to be a pessimist or handles stress poorly.

He believes Claimant responded to the questionnaires in an honest and forthright manner and gave “good effort” on most of the cognitive testing, but thinks the memory testing reflects poor effort. There was no indication Claimant exaggerated or embellished her psychiatric problems or physical problems.

Claimant suffers from mild to moderate depression, with a passive personality style, which makes her vulnerable to stress. She does not suffer from somatization but has dysthymia, a kind of chronic, low-level depressive state, almost like a personality style. Because of her personality style, Claimant is vulnerable to the effects of general stressors, but nothing that ought to be disabling by itself. People work with dysthymia all the time. It is a ubiquitous problem. Claimant’s psychological problems are not things that would prevent her from doing anything that she might have been qualified to do before from a psychological perspective.

From a psychological perspective, there is no reason Claimant could not continue working in a secretarial capacity, where she mainly answered phones, copied materials, did light typing, and scheduled appointments. Even though she was not happy with the light duty work, she has the

capacity to do the work cognitively. Whether she could tolerate the work emotionally is another question, and reflects more of a personality style issue. Her dysthymia will make it tougher for her to get back to work. Claimant is a psychologically complicated chronic pain patient.

If she did not have dysthymia, and from an orthopedic and neurological standpoint was at maximum medical improvement, in all likelihood, when she returned to the work place and other activities she would probably be able to function better than she actually is.

He recommended continued treatment with antidepressant medication and suggested that psychotherapy would probably be beneficial, in the context of a comprehensive physical restoration program with Dr. Ortenberg.

Dr. Greve's overall impression is that Claimant is not psychologically disabled from working, but does have some psychological symptoms, which would prolong her recovery. He recommended she stay on Remeron, continue treatment with Dr. Crapanzano, and go to the Musculoskeletal Institute, as well.

Claimant is not necessarily the brightest human being walking the earth, but has strengths, although not from book learning. Claimant would be better suited as a mechanic or welder.

Dr. Greve was not consulted by the person who prepared the FARA vocational rehabilitation report. The report painted a picture with indicators reasonably consistent with what Dr. Greve found. The jobs recommended in the labor survey were consistent with her capacities, even though they might not suit her personality.

Doctor Ralph Katz testified via deposition⁵⁸ that:

He is a practicing orthopedic surgeon with many years of experience. Dr. Katz examined Claimant on two separate occasions. The first was on 26 Jul 00, when Claimant bent over a rack in a tank, pulling up an eight-inch vent duct and started experiencing pain in her lower back. She also complained of pain in her left buttock cheek and posterior thigh. He conducted a physical examination.

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His physical examination revealed Claimant was a pleasant female who came into the clinic crying and bent over. She informed him she was in pain and moved very slowly. She asked that he be patient with her during the examination. In her gait, she crouched over in a slightly flexed position favoring her left lower extremity. She had extreme tenderness to any palpation across the lower back, but no palpable spasms. She had difficulty with forward flexion going to about 30 degrees and complained of pain. She had pain coming back to extension and was guarded. She gave “weak effort” in going into toe-up and heel-up positions. She had difficulty and pain when squatting. Her motor, sensory and vascular examinations were normal.

Claimant’s “weak effort” was probably either due to pain or some intentional lack of effort. Since she was crying and having pain that day, he assumed depression was part of the reason for her “weak effort.” The same analysis applied to his assessment of a “weak effort” on her motor strength in the lower extremity. She had normal motor strength despite her lack of effort. She demonstrated breakaway weakness, which is not true weakness. There were no spasms indicating that she was rigid with the muscles being tense. He assessed Claimant had acute mechanical lower back pain. The only objective finding was that she did not have a reflex at S-1 on the left, which occurs in about approximately ten percent of the population. It can be significant with other findings, such as tension signs or acute radicular symptoms, but none of those were present.

Some of Claimant’s symptoms were out of proportion to her pain. Clinically, she had pain in the sciatic notch, but did not have any radicular symptoms. Her significant symptoms of pain did not match his objective findings on physical examination. After his initial examination of Claimant, Dr. Katz did not recommend or place new work restrictions on Claimant, but admitted he would have given her a light duty position for about four weeks and then reassess her at that time.

He examined Claimant a second time on 6 Dec 00. She complained of pain in her lower back occasionally radiating into her legs. She also advised him that when she rolls over in bed, sits or stands, she has pain. She described more pain in her left thigh than the right one.

He performed another physical examination. Claimant appeared to be in no acute distress getting on or off the examining table. When he examined her lower back she was guarded, even to light stroking, and would not let him

touch her. When he lightly stroked her lower back, she complained of pain, flinched, and jumped away. He always checks for S-1 reflex, thus he must have done one on her second visit and it must have been normal, otherwise he would have reported otherwise.

She could forward flex to touch her hands down to the mid-tibia and come back to a neutral position, but complained of pain. There was no pain in her buttocks or the sciatic notch area. Her pain was central and diffuse across the lower lumbar spine. Her motor, sensory, and vascular examinations were normal, and no tension signs were noted.

Getting on and off the table reproduces flexion to about 90 degrees, and light stroking is just feeling and touching the back to assess the muscles themselves, if there were spasms or tenderness. There were no spasms, but she had “pain all over” with any type of touching.

The pain was subjective, but he assessed it in the terms of Waddell findings, which demonstrates non-organic types of behavior in terms of a lack of consistent findings. Dr. Katz found Waddell signs to be positive. The light stroking caused pain, hypersensitivity to touching, and pain with motion.

After completing his physical examination, he assessed that Claimant had lower back pain, with exaggerated symptoms out of proportion to the complaints, and both her clinical examination MRI were normal.

Mechanical lower back pain is pain across the central area of the lower back usually associated with movement. His second examination revealed no objective findings to account for Claimant’s symptoms or complaints. He did not recommend or place new work restrictions upon Claimant after his second examination, either. Since she was already working with restrictions, he kept those in place.

Claimant is not a good a surgical candidate and reached maximum medical improvement in December 2000. He reviewed Dr. Parnell’s records and agreed with Dr. Parnell’s treatment up to that point. He did not see the MRI film, but read the report.

On Claimant’s first visit, Dr. Katz did not think she was malingering, although she was possibly exaggerating her pain and discomfort.

He disagreed with the August 2000 MRI report, finding mild nerve root contact involving the exiting nerve root at L4-5. It had no significance in Claimant's case because there was no evidence of nerve root irritation in her leg.

On Claimant's second visit, he suspected malingering, based on her dramatization, jumping away, and guarding.

A psychologist who administered a full range of tests is in a better position to address overall behavioral type of problems. However, malingering is malingering and the things he noted in his second examination clearly fall in line with Claimant's inappropriate behavior of showing pain out of proportion with the examination, as well as some malingering type of behavior.

There were no objective findings upon examination or the MRI. He believes Claimant has some pain, but not to the degree or quality she reported. Claimant has minimal degenerative joint disease in her back. Based only on her symptoms, not on objective findings, Claimant needs work that will not utilize or stress her back. Based solely on her subjective complaints, nothing objective, the use of an ergonomic chair would benefit her.

Discograms are controversial. There are a large group of people that use them and a large group of people that don't. Used appropriately, with the appropriate operator; they can be of some value. There should be a control group and a person skilled in administering the examination as well as in listening to the patient's responses. If the administrator of the test disagrees with what the patient recalls, the discogram is of less value. In such a case, Dr. Katz would not base a surgical recommendation on that discogram. He read Claimant's discogram report and does not believe it supports surgery because there is no concordant pain based on the provocative response of the disc.

The July 2003 MRI report, stated "mild central posterior bulge at the L5-S1 disc that may be associated with an incomplete tear of the annulus of the L5-S1 disc. This mild posterior bulge is slightly worse now than on the prior study" and is not significant. The radiologist rated it being slightly worse at the 4-5 or the 5-1 levels. It is similar reporting.

Plenty of people have degenerative changes, but have no pain, while others, like Claimant, have minimal to moderate changes and have pain off the scale. In Dr. Katz's experience, most of those patients tend to have secondary gain issues.

Doctor Joseph Crapanzano testified via deposition⁵⁹ that:

He is an anesthesiologist with a subspecialty certification in pain medicine. Dr. Crapanzano treated Claimant for her back and leg pain. He first conducted a physical examination on Claimant 13 Feb 01. She complained of lower back pain radiating into her left leg, along the front and back. The sensation in her legs was intact. She had good motor function in her legs and normal deep tendon reflexes. She could do straight leg raises bilaterally without problems. She could walk on her heels and toes, without difficulty. She reported tenderness in her left lower muscles when he palpated her back. She seemed to be uncomfortable when he applied deep pressure to the muscle groups in that location, but there were no spasms. His impression was lower back pain and lumbar radiculopathy; that is, pain traveling from her back to her leg.

Claimant complied during the physical examination, but at various points she was uncomfortable to the point that the examination was difficult. There were no objective findings upon physical examination and Dr. Crapanzano did not place any work restrictions on Claimant. He deferred placing work restrictions upon Claimant to Dr. Miranne. Dr. Crapanzano performed an epidural steroid injection at the lower lumbar spine. Claimant was not sedated for the injection.

Dr. Crapanzano conducted a second physical examination upon Claimant on 15 Mar 01. During this examination, he briefly reviewed Claimant's neurological exam, rather than obtain a complete history or physical. He noted Claimant still had good sensation and motor function.

During this second examination, Claimant had limited range of motion of her lumbar spine. She was very uncomfortable changing from sitting to standing positions. He performed additional epidural injections. Even though Claimant was sedated with Versed, she had some back pain during the procedure and complaints of pain in her lower extremities, which was

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not out of the ordinary. There were no objective findings on the second visit either. After two epidural steroid injections she mainly complained of pain confined to her lower back and appeared to have obtained relief from her leg pain.

Dr. Crapanzano performed a limited physical examination upon Claimant on 24 Apr 01. Claimant was tender over her sacroiliac joint on the left side; accordingly, Dr. Crapanzano injected the joint with a local anesthetic and steroid. The tenderness was based on subjective reports upon palpitation. There were no objective findings.

On 17 May 01, Claimant returned for treatment and said that she had no pain. He performed another limited examination. He did not understand the etiology of Claimant's pain, as her MRI was unremarkable. The MRI demonstrated minimal changes, which did not really correlate with her symptoms. In addition, there were no objective findings correlated to her complaints. The MRI also noted some foraminal stenosis, which might have correlated with some of the leg pain, but that pain seemed resolved. He started Claimant on a low dose antidepressant, Elavil, and a low dose anticonvulsive medication, Neurontin. He continued to defer to Dr. Miranne regarding any work restrictions.

Dr. Crapanzano conducted another physical examination upon Claimant on 6 Jul 01. She was lying on the examination table in a semi-fetal position. She was agitated and informed the doctor that she slept poorly at night. Her reflexes were diminished and difficult to elicit in her legs. Straight leg raises produced discomfort at about 60 degrees on both legs. She could not cooperate very well with the strength testing of her lower extremities. She seemed to have good sensation throughout her legs. She was also tender over the sacrum just off the midline. There were no objective findings on physical examination. He was still uncertain as to the etiology of Claimant's pain, but thought Claimant might suffer from facet joint dysfunction. Statistically, about 30 percent of low back pain is due to the facet joints. A definitive diagnosis is made by performing a diagnostic block to try to eradicate the pain with local anesthetic injection. When he suggested giving her the injection, Claimant declined. He also recommended a muscle stimulator and Effexor, an antidepressant. He had trouble determining the cause of her pain, which seemed to be severe pain without an obvious cause. Claimant appeared sincere.

He again examined Claimant on 7 Aug 01 and his findings were about the same as her prior visit. She had positive bilateral straight leg raises and her strength testing was difficult because of severe pain. She had diffused indeterminate decrease in sensation, which could signify some type of spinal cord injury affecting all the lower lumbar and sacral nerve roots or might indicate nothing of significance. It might also suggest Claimant had psychological factors impacting the physical exam. Her reflexes were difficult to elicit, and she had pain and tenderness in her lower back. When he performed a range of motion test on her lumbar spine, she complained and had difficulty performing the maneuvers. Since the injections were not helping her greatly and she had tried various medications, he called Dr. Miranne and discussed performing an additional MRI.

Claimant returned to Dr. Crapanzano on 2 Oct 01, after she saw Dr. Miranne. Her sensory exam revealed intact sensation and her motor exam revealed intact muscle strength. Her reflexes were difficult to elicit and her straight leg raises were negative. He assessed lumbar radiculopathy and lower back pain of questionable etiology. Based on his discussions with Dr. Miranne and Dr. Miranne's reports, nothing explained Claimant's pain. He referred Claimant to Dr. Adams, who concurred with Dr. Miranne that Claimant's complaints were not explained by any objective evaluation findings; that her functional capacity evaluation was undermined by equivocal test results, non-organic behavior, and a partial sub-maximal effort; and further injection therapy would not benefit Claimant. Dr. Crapanzano disagreed with Dr. Adams and thought Claimant warranted a diagnostic facet injection.

Claimant's next appointment on 6 Nov 01, revealed tenderness in the left lumbar region. Her sensory testing was normal and straight leg raise tests were negative. Her motor testing was normal. She reported pain in the left lower lumbosacral region during range of motion tests. Again, there were no objective findings. He did not perform any injections, but planned to perform facet medial branch blocks for the lower three facet joints on the left-hand side.

Claimant returned for lumbar facet injections on 19 Nov 01. Dr. Crapanzano also performed a brief physical examination, which revealed tenderness in the lower left back. He performed a lumbar facet diagnostic block at the L3-4, L4-5, and L5-S1 joints on her left side. She experienced "very good relief."

On 12 Dec 01, Claimant returned to Dr. Crapanzano and reported excellent relief of her pain from the injections. Facet block injections are meant to provide, over a short term, the same relief surgery would provide over the long term. Dr. Crapanzano cleared Claimant for return to work, hoping the effect of the facet block would be long lasting.

Claimant returned with complaints on 9 Jan 02. She was neurologically intact, moved slowly from sitting to standing, and walked with a limp. She appeared to be in some distress. She advised Dr. Crapanzano that her pain had returned, but again there were no objective findings on physical examination. He believed her pain was facet medial pain requiring repeated facet injections. He did not administer the injections that day, but planned to repeat them. The injections are generally repeated every two or three weeks combined with physical therapy, but if they offered only temporary relief, radio frequency lesioning of the nerve supplying the facet joints would be offered.

On 24 Jan 02, Claimant received an additional set of injections at L4-5 and L5-S1. When she returned on 12 Mar 02, she reported no relief from those facet block injections. He did a physical examination, which remained unchanged and essentially normal. Dr. Crapanzano wanted input whether or not any psychological factors impacted her treatment. He recommended Claimant see a psychologist, Dr. Bianchini, and a physical medicine rehabilitation specialist, Dr. Gary Glynn. Dr. Crapanzano also considered performing discograms to ascertain discogenic-related pain.

He performed another physical examination upon Claimant on 22 Mar 02. Claimant appeared depressed and wept. She had tenderness in her rhomboid muscles and complained of a "sensation of ants" crawling on the mid to upper back region, which was unlike any of her prior complaints and unusual in general. He did a trigger point injection, but does not know if it provided her relief, because he never saw Claimant again.

Questions as to the etiology of her complaints remain. Dr. Crapanzano believes that Claimant's complaints of pain were sincere, even though her degree of pain seemed exaggerated with no objective findings on any of her studies. She seemed to have significant adverse impact in her personal life because of her pain. Nonetheless, he felt Claimant was sincere.

The absence of a reflex would be an objective finding; however, on July 6th, she was curled in a fetal position, making it difficult to even try examining her. Accordingly, when he tapped her reflexes she was not relaxed and he did not really place much weight on that finding. The positive straight leg raises cannot be objectively measured.

People who have pain over a long period of time tend to get depressed. In addition, someone with a bad psychological makeup may be more sensitive to pain. Finally, a normal person can develop psychological symptoms because of pain.

Dr. Crapanzano has not spoken to Dr. Ortenberg, but read her reports through 10 Dec 03. Dr. Ortenberg's experience with Claimant was similar to his. Dr. Ortenberg wanted Claimant to retry those facet injections. Dr. Crapanzano was also aware of the discogram and of Dr. Montz and Dr. Butler's recommendations. He does not think surgery is a good idea. In general, surgery to relieve pain of indeterminate etiology on patients who already had multiple injections has been a failure.

Statistically, the facets account for about 30 percent of back pain; the sacroiliac joints account for about 10 to 15 percent; and the discs account for about 40 percent. By ruling out the discs and facet joints as causes, and trying sacroiliac joint injections, they have covered about 85 percent of the known etiology. The rest of the possible causes of her pain are likely due to soft tissue problems, which cannot be removed surgically.

Dr. Crapanzano believes Claimant should never do heavy physical manual work. In addition, an orthopedic chair might help Claimant if she were given a desk job.

Statistically, patients that have chronic pain greater than three to six months have a very high incidence of depression.

Finally, is very significant that the discogram pain is the same pain the patient experiences on a regular basis. Dr. Crapanzano uses discograms in his practice. His review of Claimant's discogram indicates that surgery is not warranted.

Doctor Lucein Miranne testified via deposition⁶⁰ that:

He has been a practicing orthopedic surgeon for many years. Dr. Parnell referred Claimant to him. Dr. Miranne first examined Claimant's back and primary lower extremities on 12 Jan 01. He also reviewed her MRI. Claimant complained of lower back pain and occasional left leg pain. Physical examination revealed exquisite tenderness in her left SI joint, no point tenderness in the midline lumbar spine, no spasms, normal curvature, and diminished range of flexion and extension. In addition, she had no wasting of muscle mass in her extremities and negative straight leg raise and Bowstring sign. She also had no hip pain, normal strength and sensation, and her deep tendon reflexes were symmetrical.

There were no objective findings, which Dr. Miranne found to be abnormal. He thought Claimant might have sacralitis on the left side, but did not think she had any neural impingement or significant neurosurgical problem. He ordered injections in the sacroiliac joint and discharged her. He placed no work restrictions on Claimant.

He saw Claimant again on 15 Aug 01. She had diminished range of motion and diffuse lumbar tenderness. He conducted another physical examination, and noted no SI joint pain. Claimant had tenderness bilaterally in the toe extensors and some weakness, which could indicate a disc herniation. Claimant also produced pain on straight leg raise. He noted lumbar radiculopathy, which was new. However, there were still no objective findings. He recommended additional diagnostic imaging, but did not place Claimant on any work restrictions. He did not believe Claimant was a candidate for surgery.

He last saw Claimant on 12 Sep 01. She continued to complain of back and bilateral leg pain. He performed an examination, but it disclosed no obvious focal changes. She had normal motor function and symmetrical deep tendon reflexes. Her subjective complaints did not correlate clearly to a nerve root patter. He also reviewed the 27 Aug 01 MRI scan and report. It showed minimal degenerative changes and was essentially normal. There was no impingement. His impression was lower back pain not explained by scan or x-ray. He recommended neurological and gynecological evaluations to rule out other etiology of pain and discharged her. Dr. Miranne's opinion remained unchanged from 15 Aug 01. He did not believe surgery was appropriate and imposed no work restrictions.

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The August 2001, MRI report appears to be inconsistent with the 9 Aug 00 MRI. He explained much of the difference may be attributable to different machines and radiologists. The later MRI was performed by Dr. Patel, one of the best radiologists in the city. As such, Dr. Miranne would put more stock in Dr. Patel's MRI scan and report dated 27 Aug 01.

Even if he considered the July 2003 MRI, which reported a slight increased bulge at 5-1, Dr. Miranne would not change his recommendation. He does not believe radicular pain is possible without impingement. Therefore, surgery is not a good option for Claimant. He normally does not trust discograms because in more than 15 years of practice, he only had one case where a discogram helped. He believes finds that discograms tend to give false positives and rely on patients' subjective reports. Dr. Miranne would not recommend surgery based on a discogram where the patient and radiologist disagreed about what the patient actually reported at the time of the test.

Doctor James Butler testified via deposition⁶¹ that:

He is board certified in orthopedics. He saw Claimant on three occasions. Dr. Butler first treated Claimant on 29 Sep 03, when she presented with back pain and weakness in her legs. He took Claimant's history, conducted an examination, and took x-rays. The x-rays were normal. Her history and his examination were consistent with lumbar disc syndrome. He later reviewed Claimant's 14 Jul 03 MRI report and compared it to the August 2001 MRI. He could not say with any reasonable degree of medical certainty that the L5-S1 changes were clinically symptomatic. He therefore recommended a discogram, which was done 12 Feb 04.

Dr. Butler never reviewed the actual discogram films, but the report stated no concordant report of pain upon injection at the level of interest. On 25 Feb 04, however, Claimant discussed the results with Dr. Butler. She told him she reported concordant pain at the time of the discogram. Based on Claimant's version of what she reported, Dr. Butler believed surgery was appropriate and told her so. However, Employer would not approve the surgery and

Dr. Butler has not seen Claimant since. Dr. Butler did not think Claimant was malingering and believed the MRI report showing degeneration of the L5-S1 disc was an objective finding consistent with her symptoms. He does

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not think a myelogram would be helpful and believes surgery is the only reasonable treatment modality. On the other hand if no surgery is provided, Claimant should continue seeing a pain management specialist.

His recommendation for surgery was based on the MRI and her report of pain on the discogram. Had the discogram been negative, Dr. Butler would not recommend surgery. Regardless, there were no objective reasons Claimant could not do light duty work.

Dr. Butler does not think an orthopedic chair would improve Claimant's condition, but might help increase her tolerance. Chronic lower back pain patients experience increases and decreases in the level of pain. He is not sure whether Claimant's pain was severe enough to require a trip to the emergency room, but pain does vary in intensity.

Doctor Karen Ortenberg testified via deposition⁶² that:

She is a board-certified practicing psychiatrist. Dr. Ortenberg saw Claimant on 23 occasions between 10 May 02 and 9 Aug 04. Dr. Greve referred Claimant to her. Claimant provided an extensive history and Dr. Ortenberg reviewed Dr. Crapanzano's evaluation. Dr. Ortenberg knew the surgeons recommended no surgery; therefore, she prescribed medication and occupational therapy. Claimant was restricted to light duty and 40 hour weeks at that time.

Over the course of treatment, Dr. Ortenberg tried various treatment modalities; including therapy, medication, and trigger point injections. Claimant reported significant relief from the trigger point injections. Overtime, Claimant's subjective complaints of leg and back pain remained relatively constant or worsened, subject to brief periods of relief. Her pain is unexplained, without any objective findings. Dr. Ortenberg noted that whenever she entered the treatment room, Claimant would be lying down saying she was unable to assume a sitting position. At the same time, Claimant reported she was very active at home, doing all the housework.

Based on the occupational therapist's report, Dr. Ortenberg believed Claimant should have an ergonomically correct workstation, a chair with adjustable armrests, height, and seat back; lumbar support; and wheel casters, in addition to a footrest and headset. When Dr. Ortenberg recommended a chair for Claimant, she did not specify a particular chair, but rather pointed out the general characteristics of the chair. Not having

⁶² CX-9

that type of chair did not cause more damage. Someone with a bad back in a good chair will feel less pain than in a bad chair. The chair was intended to minimize Claimant's discomfort and make her work more bearable. The chair was not intended to serve as a treatment modality that would actually improve pathology.

The July 2003 MRI report of a possible tear at the L5-S1 and possible stenosis at the L4-5 correlated with Claimant's complaints, but Dr. Ortenberg could not explain Claimant's subjective complaints in light of the physical examinations and diagnostic studies. At times Dr. Ortenberg noted "cogwheeling" and that Claimant's movements would normalize slightly upon distraction. At one point, Claimant reported problems with her legs and falling as a consequence, bruising her calf. Upon examination, Dr. Ortenberg found no bruising.

There is no one available at Dr. Ortenberg's office during non-business hours to receive calls if a patient is in distress. Claimant had adequate pain medications, making emergency room visits because of pain unnecessary. At times, Claimant had more medications, prescribed by multiple providers, than she needed. Dr. Ortenberg asks her patients not to obtain pain medications from other sources, and to inform her if they do. Claimant never informed Dr. Ortenberg she took other prescribed medications.

At the end of their course of treatment, Dr. Ortenberg found Claimant's complaints to be "out of proportion to the objective clinical findings." Claimant was very focused on her pain and disabilities. Claimant complained that she was in too much pain to complete a straight leg test, but then remained in a long seated position, which should have reproduced the same pain.

Dr. Ortenberg believes Claimant's symptoms go along with an L5-S1 pathology, but recommended further studies to assess Claimant's psychological candidacy for surgery. Dr. Ortenberg would have Dr. Greve reevaluate Claimant and would also defer to the orthopedic or neurosurgeons as to whether Claimant is otherwise a good surgical candidate. In her experience with patients such as Claimant, one-third improves after surgery; one-third has no change, and one-third get worse. Dr. Ortenberg is concerned that red flags such as the medication overages, inconsistency between subjective complaints and objective findings, and over dramatization, might make Claimant a poor surgical candidate. Dr. Ortenberg believes Claimant has a bad back and is limited to light work.

Dr. Ortenberg never formally discharged Claimant from her care. Dr. Ortenberg is not aware of anyone in her office telling Claimant that she would not see her any more. Doctor Ortenberg believes Claimant needs to be under the treatment of a pain management specialist and would take Claimant back as a patient in that capacity.

Angela Speir testified via deposition⁶³ that:

She is a claims adjuster for the third-party claims administrator for Employer. She recalled receiving a request, from Dr. Ortenberg, for an orthopedic chair for Claimant. Employer asked Dr. Ortenberg, by fax, for more specific details on the type of chair recommended. She does not recall the specific document that was faxed. Ms. Speir discovered that Employer already had an orthopedic chair and provided it to Claimant. The chair had no armrest or lumbar support. After this chair was provided to Claimant, Employer made no other efforts to get Claimant another chair, even though further medical reports discussing the need for an orthopedic chair were sent to Employer. Ms. Speir thought the issue was taken care of.

Before emergency room visits are approved for payment by Employer, claimants must provide a note from their treating doctor that the doctor was not available and the claimant was instructed to go to the emergency room.

The Employer First Aid Medical Records⁶⁴ show:

A functional capacity evaluation (“FCE”) was conducted on 7 Sep 00.⁶⁵ The results were rated at only 63% valid because of indications of submaximal effort by Claimant and non-organic behavior. The FCE determined Claimant could not go back to her original job as a painter, but was qualified for jobs classified as “sedentary.”

Employer received specific guidance on the type of chair Dr. Ortenberg believed Claimant should have.⁶⁶

⁶³ CX-15

⁶⁴ EX-10

⁶⁵ *Id* at 103.

⁶⁶ *Id* at 35

***The Employee's Guide*⁶⁷ shows:**

Theft is an "immediate discharge offense."

***Claimant's employment records*⁶⁸ show:**

In May of 1991 and December of 1998, Claimant received warnings for being absent. She was also warned, in January of 2002, for leaving work without permission. Employer discussed her "abuse of sick leave" and her "industrial back injury" in deciding to terminate her.⁶⁹ In 16 Aug 04, Claimant was again warned for absenteeism and tardiness.⁷⁰ She received 28 cited incidents from 16 Jun 04 to 13 Aug 04, including late arrivals, untimely requests for whole or half vacation days, and unexcused absences.

***West Jefferson Medical Center Records*⁷¹ show:**

On multiple occasions in June through September of 2000, Claimant presented to the emergency department complaining of back pain. There are outstanding bills for those visits.

***Dr. Katz's Records*⁷² show:**

Observations and impressions consistent with his deposition. Include the August 2000 MRI report of possible L4-5 mild nerve root contact.

***Westbank Orthopedic and Sports Therapy Records*⁷³ show:**

Claimant attended physical therapy in August of 2000. She made no progress, reported no improvement, had questionable compliance in her home program of exercises, and showed positive signs of non-organic behavior. A functional capacity evaluation was recommended to ascertain consistency of effort.

⁶⁷ EX-7 p.20

⁶⁸ EX-9

⁶⁹ *Id.* at p.86

⁷⁰ *Id.* at p.95

⁷¹ EX-11;CX-13.

⁷² EX-12.

⁷³ EX-131.

Dr. Melvin Parnell's Records⁷⁴ show:

He treated Claimant on multiple occasions in 2000 and 2001, following her June 2000 injury. She presented complaining of leg and back pain and demonstrating limited range of motion. There were no significant objective findings on examination. He agreed with Dr. Katz's assessment⁷⁵ and prescribed various pain and anti-inflammatory medications.

Dr. Miranne's Records⁷⁶ show:

Observations and impressions consistent with his deposition. Include the August 2001 MRI report of no abnormality at the L4-5.

Dr. Crapanzano's Records⁷⁷ show:

Observations and impression consistent with his deposition. Includes a 2 Oct 01 prescription for a chair with lumbar support.

Dr. Greve's Records⁷⁸ show:

Observations and impressions consistent with his deposition.

Dr. Adams' Records⁷⁹ show:

Observations and impressions consistent with his deposition. Includes a 22 Oct 01 EMG, with normal results.

Dr. Ortenberg's Records⁸⁰ show:

Observations and impressions consistent with her deposition. (Dr. Ortenberg first saw Claimant on 10 May 02, as a referral from Dr. Crapanzano and treated her at least through the summer of 2004. She tried various treatment modalities, including physical therapy, medication, and trigger point injections. Overtime, Claimant's subjective complaints of leg and back remained relatively constant or worsening, subject to brief periods

⁷⁴ EX-14.

⁷⁵ *Id.* at 8.

⁷⁶ EX-15.

⁷⁷ EX-16; CX-8.

⁷⁸ EX-17; CX-10.

⁷⁹ EX-18.

⁸⁰ EX-19.; CX-9

of relief. They are unexplained by any objective findings.⁸¹ Doctor Ortenberg believed Claimant reached MMI on as of 26 Jul 02. On 5 Aug 02, and multiple occasions thereafter, Doctor Ortenberg informed carrier that Claimant could work as a light duty dispatcher, but in order to ensure an ergonomically correct workstation, recommended Claimant be provided with a chair with adjustable armrests, height, and seat back; lumbar support; and wheel casters, in addition to a footrest and headset.⁸² Doctor Ortenberg agrees with Doctor Montz's assessment.⁸³

Dr. Butler's Records⁸⁴ show:

Observations and impressions consistent with his deposition. He first saw Claimant on 29 Sep 03, upon self-referral from a second opinion. Claimant provided her history and related current lower back and leg pain. He conducted a physical examination and took x-rays. Her history and his examination were consistent with lumbar disc syndrome. He later reviewed the report from Claimant's 14 Jul 03 MRI, which he compared to the August 2001 MRI. He could not say with any reasonable degree of medical certainty that the L5-SI changes were clinically symptomatic. He therefore recommended a discogram, which was done 12 Feb 04. The actual discogram report stated that there was no concordant report of pain upon injection at the level of interest. However, Claimant later maintained that she did report concordant pain. Based on Claimant's version of what she reported, Dr. Butler believes surgery is appropriate.

Dr. Montz's Records⁸⁵ show:

Observations and impressions consistent with his deposition. He does not believe surgery would enable her to return to her original job or relieve her pain.⁸⁶

Vocational Rehabilitation Reports by Dot Moffett-Douglas⁸⁷ shows:

Background and findings consistent with her deposition.

⁸¹ *Id* at 25.

⁸² *Id* at 15,36.67

⁸³ *Id* at 63.

⁸⁴ EX-21.

⁸⁵ EX-22.

⁸⁶ *Id* at 2

⁸⁷ EX-23.

Deep South Investigation Records⁸⁸ show:

On various dates between 19 Sep 00 and 1 Oct 00, Claimant was observed entering and exiting a car, operating a car in traffic, turning her head and neck, walking with normal gait, sweeping, carrying and installing a child safety fence, pushing a female in a wheelchair, carrying a wheelchair and lifting it into a car, lifting and carrying a laundry basket, and moving through a full range of motions without any evidence of distress or disability.

Dr. Charles Cargille's Records⁸⁹ show:

Claimant presented in December 2004, complaining of back pain. Dr. Cargille prescribed pain medications.

Tulane Medical Records⁹⁰ show:

Claimant presented in April 2004, complaining of back pain.

North Oaks Medical Records⁹¹ show:

In August and December of 2004, Claimant presented to the emergency room with complaints of back pain. The bills for those visits remain unpaid.

Analysis

Compensation

Clearly, Claimant met her prima facie case burden, establishing that she suffered harm (her back and leg pain) and that a work-related condition existed (working in a very restricted area in June of 2000) that could have caused that harm. Thus, the section 20(a) presumption is applicable. Employer failed to offer substantial countervailing evidence to rebut the presumption. In addition, there is no suggestion by Employer that Claimant could return to her original job. Consequently, the real issues before this Court are the degree of Claimant's disability and whether Employer established suitable alternative employment (SAE).

⁸⁸ EX-24.

⁸⁹ CX-12.

⁹⁰ CX-14.

⁹¹ CX-11.

Employer has not refilled the senior material analyst position left vacant with since Claimant's termination. However, there is a hiring freeze causing two other positions to also remain vacant. The position was not new when Claimant was promoted. Claimant was offered this position because she could not jump two pay levels to the material project administrator position that she originally sought. In order to qualify for the position, Claimant took an evening computer course. The senior material analyst was not a position created specifically for Claimant or sheltered employment.

The general physical requirements of the senior material analyst position were within the parameters set forth by virtually all of the doctors who treated Claimant or reviewed her case. Most of the doctors also agreed that an orthopedic chair would likely lessen Claimant's discomfort and make work more tolerable for her. Dr. Ortenberg specifically described a chair for Claimant with lumbar support, a footrest, a headset, and adjustable armrests, among other requirements. Employer never provided Claimant with a chair that met those specifications.

Consequently, the issue is whether the analyst job, with the chair actually used by Claimant, qualified as SAE. Dr. Ortenberg recommended a specific type of chair, which Claimant repeatedly asked Employer to provide, but Employer provided a non-compliant alternative. Dr. Ortenberg recommended the chair only to minimize Claimant's discomfort, not as a prerequisite for Claimant to do the job at all. Even if Claimant accepted the analyst position, it does not qualify as SAE if it required her to expend extraordinary effort or endure excruciating pain or diminished strength.

Thus the central question is whether the absence of the specific chair recommended by Dr. Ortenberg resulted in Claimant expending extraordinary effort or enduring excruciating pain or diminished strength. She currently has a job (albeit on a significantly abbreviated work schedule) which does not provide such a chair.⁹² Ultimately, the most probative evidence came from Claimant's candid testimony at hearing.

Q. Did you enjoy your job at Avondale?

A. Yes.

Q. I think you said earlier that other than for the discharge, you would have been able to continue to work at Avondale, correct?

A. Excuse me?

Q. Other than for the discharge, the termination, you could have continued to work at Avondale in that job as a senior material analyst?

A. Yes.

⁹² Employer offered evidence of other jobs. However, none of those jobs included an orthopedic chair. Consequently, there is no reason to view them as any more likely to qualify as SAE than the analyst job Claimant actually held.

Q. So am I correct in assuming that other than the theft incident, or whatever you want to call the incident that led to your termination, but for that event, you would still be working at Avondale probably?

A. Probably. If they hadn't fired me for being late.⁹³

* * *

Q. When you addressed the question a few moments ago about but for being terminated, that you would still be working at Avondale, did you consider that a normal job? Or did you have trouble keeping the job, maintaining the position?

A. I don't think I had trouble maintaining the position.

Q. Physical trouble.

A. Physical trouble? Yeah.

Q. What was it?

A. I was always hurting. Some of the meetings required us to go up on ships until I finally told them, "Look, I can't be doing all that climbing." So they stopped me from going to their meetings and started having me to go to the ones on the ground.⁹⁴

The above testimony does not support a finding that Claimant expended extraordinary effort or endured excruciating pain or diminished strength. She accepted the job and remained in that position for an extended period, doing a good job when not absent or distracted by personal problems.

Claimant's observation that she was fired for being late raises two additional issues. The first relates to her absence problems. If her physical condition was such that it made it impossible to get to work on time, then the job would not qualify as SAE. However, no doctor opined that allowances should be made for tardiness. No note was provided to Employer advising it that Claimant could not get to work on time. In fact, Dr. Ortenberg specifically disavowed such a notion. Moreover, Claimant's attendance problems came to a head concurrently with her move to Ponchatoula and she even conceded it was hard for her to make the trip. However, she did not use that as an excuse, since she chose to move. Accordingly, her tardiness was not caused by her disability.

The second issue relates to the reason Claimant was discharged. The record shows that Claimant took the cokes and did not return them. She says she intended to return them and never intended to steal the cokes. The discovery of the additional cokes is circumstantial evidence to the contrary. Most probative is the testimony of Claimant's

⁹³ Tr. 119

⁹⁴ Tr. 122

co-worker that Claimant said she would return her boss's cokes but not hers. Regardless, the central question is not whether Claimant stole the cokes, but whether Employer in good faith believed she stole them.⁹⁵ I find the record establishes that it did. It is true that Claimant's absences and back injury were raised in the termination discussion and that other employees who took the cokes (and perhaps money) were not terminated. However, those other employees were never identified. The record shows that Claimant would not have been terminated but for Employer's belief that she stole the cokes. Even if tardiness was a factor, it qualified as misconduct and not an unavoidable consequence of her disability.

In sum, Claimant was provided SAE that paid more than her AWW, remained in that SAE for an extended period, and was subsequently discharged for misconduct. Therefore, she is not entitled to any disability compensation.

Emergency Room Visit Bills

Claimant sought to recover medical costs and disability associated with emergency room treatments for episodes when physicians were not available. Claimant received emergency room treatment at West Jefferson Medical Center,⁹⁶ Tulane Medical Center,⁹⁷ and North Oaks Health System.⁹⁸

It was both reasonable and necessary for Claimant to seek treatment in emergency rooms without prior authorization from Employer when she suffered from back pain during "off hours" and her treating physicians were not available. As such, I determine that Claimant is entitled to reimbursement for such costs expended from treatment in emergency rooms after hours at North Oaks Health System and West Jefferson Medical Center and Tulane Medical Center.

Surgery and Pain Management

Only one doctor, Dr. Butler, believes that surgery is appropriate. He bases that on an assumption that the report from the discogram is incorrect and that Claimant was correct in telling him, after the test, that the pain upon injection of the object disc was concordant. None of Claimant's other doctors favor surgery without additional testing,

⁹⁵ The finding of the state workers compensation ALJ (CX-16) is neither binding nor particularly relevant. It follows different burdens of proof and addresses a different question.

⁹⁶ CX-13 (Claimant incurred the following bills at West Jefferson Medical Center and the attending physician: 21 Aug 2003, \$215.00; 31 July 2003, \$520.00; 28 June 2001, \$193.00; 18 June 2000, \$314.50).

⁹⁷ CX-14 (Claimant's exhibit list refers to this exhibit as "Medical records and charges concerning emergency room visit to Tulane Medical Center dated April 12, 2004.)

⁹⁸ CX-11, pp. 28-34 (The following bills at North Oaks Health System remain unpaid: 11 August 2004, \$668.03 and 03 April 1997, \$134.50).

and some do not favor it at all. Therefore, even though Dr. Butler testified that all he has to offer Claimant is surgery to her low back, the weight of the evidence in the medical record does not support a finding that surgery is reasonable or necessary.

On the other hand, the record supports a finding that pain management therapy is reasonable and necessary. After termination, Claimant sought additional treatment from Dr. Ortenberg, who advised her to obtain authorization from Dr. Butler. Since Dr. Butler informed Claimant he could not help her unless she underwent low back surgery, Claimant was forced to seek medical treatment on her own. Claimant began pain management treatment with Dr. Cargill, for which she seeks reimbursement of expenses incurred. I find the pain management treatment both reasonable and necessary as Claimant's treating doctors, Drs. Ortenberg, Adams, Crapanzano, and Greve, opined that Claimant needed to be provided pain management care. In fact, Dr. Ortenberg testified that Claimant needs to be under the treatment of a pain management specialist and would take Claimant back as a patient in that capacity. In addition, Dr. Butler testified Claimant would need to be under the care of a pain management specialist indefinitely, if she does not undergo back surgery. Therefore, Claimant is entitled to reimbursement of any past and future expenses incurred from treatment with a pain management specialist.

ORDER AND DECISION

1. Claimant's claim for disability benefits and compensation is denied.
2. Employer shall pay for Claimant's emergency room visits as reflected in CX-11 and 13 and referenced in footnotes 94 and 96.
3. Employer shall pay all reasonable, appropriate and necessary medical expenses arising from Claimant's back injury, pursuant to the provisions of Section 7 of the Act. This includes at this time pain management care as recommended by Dr. Ortenberg and Dr. Greve. It also includes reimbursement for emergency room visits to Tulane Medical Center, North Oak Health Systems, and West Jefferson Medical Center. It does not include surgery as recommended by Dr. Butler.
4. Employer shall receive credit for all compensation heretofore paid, as and when paid.
5. Employer shall pay interest on any sums determined to be due and owing at the rate provided by 28 U.S.C. § 1961 (1982).⁹⁹

⁹⁹ Effective February 27, 2001, this interest rate is based on a weekly average one-year constant maturity Treasury yield for the calendar week preceding the date of service of this Decision and Order by the District Director. This order incorporates by reference this statute and provides for its specific administrative application by the District Director. Grant v. Portland Stevedoring Co., et al., 16 BRBS 267 (1984).

6. The district director will perform all computations to determine specific amounts based on and consistent with the findings and order herein.

7. Claimant's Counsel is hereby allowed thirty (30) days from the date of service of this decision by the District Director to submit an application for attorney's fees.¹⁰⁰ A service sheet showing that service has been made on all parties, including the Claimant, must accompany the petition. Parties have twenty (20) days following the receipt of such application within which to file any objections thereto. In the event Employer elects to file any objections to said application it must serve a copy on Claimant's counsel, who shall then have fifteen days from service to file an answer thereto.

So ORDERED.

A

PATRICK M. ROSENOW
Administrative Law Judge

¹⁰⁰ Counsel for Claimant should be aware that an attorney's fee award approved by an administrative law judge compensates only the hours of work expended between the close of the informal conference proceedings and the issuance of the administrative law judge's Decision and Order. Revoir v. General Dynamics Corp., 12 BRBS 524 (1980). The Board has determined that the letter of referral of the case from the District Director to the Office of the Administrative Law Judges provides the clearest indication of the date when informal proceedings terminate. Miller v. Prolerized New England Co., 14 BRBS 811, 813 (1981), aff'd, 691 F.2d 45 (1st Cir. 1982). Thus, Counsel for Claimant is entitled to a fee award for services rendered after **June 16, 2004**, the date this matter was referred from the District Director.